

**A. 2 (B)**

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 were less significant.

3 Q. In the weekend, that's the Saturday  
4 the 20th and Sunday the 21st, were there  
5 significant changes made in the terms over the  
6 weekend leading to the Monday?

7 A. Not that I recall.

8 Q. Just to pick an example, and I'm going  
9 to go through a couple of these, but to pick an  
10 example of changes affected by the clarification  
11 letter, would you take a look please at  
12 paragraph 9 entitled Deletion of Purchase Price  
13 Adjustment Provisions. Okay?

14 And you probably, Mr. Berkenfeld, may  
15 as well reach into the pile of exhibits and pull  
16 out the Asset Purchase Agreement itself because  
17 we're going to be doing some comparisons.

18 Now, Section 3.3, you see that  
19 paragraph 9 of the clarification letter deletes  
20 in its entirety -- well, says, in full, "Section  
21 3.3 of the Original Agreement is hereby deleted  
22 in its entirety and shall be of no effect ab  
23 initio." See that?

24 A. Yes.

25 Q. And for context, if you take a look at  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 3.3 of the Asset Purchase Agreement, that's that  
3 adjustment to cash amount provision we talked  
4 about before with the \$750 million cap?

5 A. Yes.

6 Q. Right? Why did that come out?

7 A. I don't know.

8 Q. Any clue at all?

9 A. No.

10 Q. Did you have an idea at the time as to  
11 why that came out?

12 A. No.

13 Q. Would you consider a \$750 million, the  
14 possibility of a \$750 million benefit to Lehman  
15 to be significant in the context of this overall  
16 deal?

17 A. It's just an opinion. I don't know  
18 that I'm in a position to answer that.

19 Q. I'll take that. We'll worry  
20 admissibility later. What's your opinion?

21 A. It really depends on likelihood of  
22 whether that amount was ever going to be paid.

23 Q. Okay. Would you have been in a  
24 position to assess that likelihood on the 20th  
25 of September, four days after the Asset Purchase  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 Agreement?

3 A. I don't think anyone in the world  
4 would be.

5 Q. Okay. So you have a letter dated as  
6 of September 20 that eliminates that provision  
7 from an agreement made four days before. With  
8 that as context, can you recall when you signed  
9 this agreement you had a sense of whether this  
10 was a material or significant change?

11 A. I don't recall.

12 Q. Do you know when that -- I'll show  
13 them to you, but we talked about drafts of the  
14 clarification letter. Do you know when in the  
15 sequence of events between the 17th and the 22nd  
16 that provision was added to the clarification  
17 letter?

18 A. I don't.

19 Q. Do you know at whose behest it was  
20 added?

21 A. I don't.

22 Q. Do you know which side of the table at  
23 whose behest was it? Was it a Lehman  
24 requirement or a Barclays requirement?

25 A. I don't.

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD

2 Q. Do you know why the letter is dated as  
3 of September 20?

4 A. No.

5 Q. Do you have a recollection of any  
6 discussion of dating it as of September 20 as  
7 opposed to the date on which it was signed?

8 A. No recollection.

9 Q. Do you recall seeing a draft dated  
10 September 21?

11 A. I don't recall.

12 Q. Were you party to any discussion about  
13 whether or not the terms of the clarification  
14 letter should be submitted for approval by the  
15 court?

16 A. I was not part of any of those  
17 discussions.

18 Q. Did you hear any discussion along  
19 those lines?

20 A. No.

21 Q. Is that an issue that occurred to you  
22 when you signed the agreement?

23 A. Not that I recall, no.

24 Q. Do you know what was done by way of  
25 bringing the clarification letter to the court's

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **attention?**  
3 A. I don't.  
4 MR. STERN: To the extent that you ask  
5 questions that may call for disclosure of  
6 privileged conversations, that's your call  
7 as to whether you ask those questions.  
8 MR. BYMAN: Could you speak up just a  
9 little bit?  
10 MR. STERN: Yeah. Sure. To the  
11 extent that you ask questions that may call  
12 for disclosure of privileged conversations,  
13 that's your call as counsel for Lehman. I  
14 just want to put on the record that we will  
15 take the position that that constitutes a  
16 subject matter waiver and we'll reserve our  
17 rights in that regard.  
18 MR. GAFFEY: I think you're reserving  
19 rights about an event that hasn't happened  
20 yet. I'll deal with it if it happens, okay?  
21 I get the point. I know that's an  
22 issue. I'm not trying to be glibly about  
23 this, but let's deal with it when it occurs.  
24 MR. STERN: Well, you asked a question  
25 about any discussions about whether  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **concerning the definition of "purchased assets,"**  
3 **when the agreement speaks -- when the**  
4 **clarification letter speaks in terms of**  
5 **securities owned by LBI and transferred,**  
6 **transferred to purchaser or its affiliates under**  
7 **the Barclays Repurchase Agreement, do you know**  
8 **if that verb was selected deliberately?**  
9 A. This is in, I'm sorry, which section  
10 again?  
11 Q. We're in 1(A)(ii)?  
12 A. (A)(ii).  
13 Q. On the first page concerning purchased  
14 assets,  
15 A. "Transferred," the word "transferred"  
16 in which section?  
17 Q. 1(A)(ii).  
18 A. But in which sub clause? Right in the  
19 third line?  
20 Q. Sub clause capital A.  
21 A. Okay.  
22 Q. Which refers to securities owned by  
23 LBI and, quote/unquote, transferred?  
24 A. No, I don't. I don't know why that  
25 word was chosen.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 something should be presented to the court  
3 of a Lehman executive pre-acquisition.  
4 That's all I'm saying. I'm just alerting  
5 you to it.  
6 MR. GAFFEY: Okay. And all I'm saying  
7 is I neither agree or disagree with you.  
8 I'm not taking a position yet. I'll deal  
9 with it when we have an issue.  
10 MR. STERN: Fair enough.  
11 (Exhibit 26, Notice of Filing of  
12 Purchase Agreement, marked for  
13 identification, as of this date.)  
14 Q. Mr. Berkenfeld, I have put before you  
15 a document entitled "Notice of Filing of  
16 Purchase Agreement Approved by Order Under 11  
17 U.S.C., et cetera, et cetera, et cetera.  
18 Have you seen that document before?  
19 A. I don't think I have.  
20 Q. Do you know when it was filed?  
21 A. I don't know when it was filed.  
22 Q. Nothing further about that.  
23 Now, back into the purchase -- I'm  
24 sorry, the clarification letter, sir. There's,  
25 and again, in paragraph 1(A) subsection 2,  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 Q. And there's a reference in that same  
3 paragraph to a Schedule A and a Schedule B. Do  
4 you see that?  
5 A. Yes.  
6 Q. Okay. Do you know what those are  
7 references to?  
8 A. No.  
9 Q. Have you any understanding of what --  
10 either with or without regard to the  
11 clarification letter, do you have any  
12 understanding of what Schedule A and Schedule B  
13 were in connection with the assets transferred  
14 from Lehman to Barclays?  
15 A. All I know is what I'm reading in the  
16 agreement.  
17 Q. Okay. Did you have any involvement in  
18 or knowledge of the assembly of schedules of  
19 assets that were -- Schedule A, which were  
20 assets that were contained within the Repurchase  
21 Agreement, and Schedule B, which were additional  
22 assets, to show what was transferred from Lehman  
23 to Barclays?  
24 A. No, I did not.  
25 Q. Is that an event or an activity or an  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 issue that has crossed your screen, that has  
3 come to your attention at any point since?  
4 A. Not that I recall.  
5 Q. So would you know who I would ask, who  
6 would -- who would know about the assembly and  
7 the contents of Schedule A and Schedule B?  
8 A. I think that Jim Seery. John Coughlin  
9 might know.  
10 Q. Uh-huh.  
11 A. Bart may know. I don't know.  
12 Q. When you signed the agreement, did you  
13 know what Schedule A and Schedule B were that  
14 were described in but not attached to the  
15 clarification letter?  
16 A. Just as it represented in the section.  
17 Nothing more than what's in the agreement.  
18 Q. Nothing more than the language of the  
19 agreement?  
20 A. Yes.  
21 Q. You know, with respect to both the --  
22 actually, all three of the Asset Purchase  
23 Agreement, the First Amendment, which we marked  
24 as Exhibit 24, and the clarification letter,  
25 which is marked as Exhibit 25, why did you sign  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 Holdings, Inc. files on the 15th. Lehman  
3 Brothers, Inc., the broker-dealer, files on the  
4 19th, okay? So I want to just be on the 16th  
5 where the state of play is LBHI is filed, but  
6 LBI is not.  
7 The negotiators included Mr. McDade.  
8 Was he not authorized to sign on behalf of LBHI?  
9 A. He was.  
10 Q. Was he not present?  
11 A. He wasn't present at the time the  
12 document was ready to be signed.  
13 Q. Let me back this up a little bit.  
14 This is -- I'm sort of curious about this.  
15 Where are you when you sign this? Who is in the  
16 room?  
17 A. We are --  
18 MR. STERN: "This" is?  
19 Q. Good point. "This" is the Asset  
20 Purchase Agreement.  
21 A. We're in that conference room that I  
22 had described earlier.  
23 Q. Okay.  
24 A. In the corner of the 32nd floor.  
25 Q. Right.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 them? Why are you the guy who signs them?  
3 A. I signed the Asset Purchase Agreement  
4 because at the time there was nobody else who  
5 was an authorized officer of Lehman Brothers  
6 Holdings available to sign it there present who  
7 could sign it, and to some extent, I think the  
8 amendments and the clarification letter were  
9 brought to me by the counsel just for  
10 consistency after that.  
11 Q. Now, you said there was no other one  
12 authorized to sign on behalf of LBHI present who  
13 could sign it. I note the distinction there.  
14 Was from someone on behalf of LBI  
15 present who could sign it? Withdrawn.  
16 A. Yes.  
17 Q. Actually, that question is misleading  
18 as it stands. Let me withdraw it.  
19 On the 16th, that is, before Lehman  
20 Brothers, Inc. files for bankruptcy protection,  
21 so on the 16th --  
22 A. That wasn't before we filed.  
23 Q. Let me be -- I've confused this record  
24 and this is entirely my fault. Let me give you  
25 two dates to deal with. One is Lehman Brothers  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. And day goes into night and night goes  
3 into day, but at the time when the agreement had  
4 been finalized by the lawyers and ready for  
5 signature, Bart McDade and other potential  
6 signatories for Lehman Brothers Holdings were  
7 not still there as the lawyers were finishing up  
8 the drafting of the document.  
9 Q. Okay.  
10 A. Just to make this easier for you,  
11 there are not a lot of authorized signatures of  
12 Lehman Brothers Holdings, Inc.  
13 Q. Okay.  
14 A. I don't know who was employees and  
15 what payroll they were on that had other reasons  
16 for that, but the employees of Lehman were not  
17 technically, not from necessarily a tax  
18 standpoint, but they were officers of Lehman  
19 Brothers, Inc. So anyone who was a managing  
20 director of Lehman Brothers was a managing  
21 director of Lehman Brothers, Inc.  
22 Q. Right. But not necessarily Holdings?  
23 A. Lehman Brothers Holdings was our  
24 public company, so it included Dick Fuld, it  
25 included Bart McDade, it included Ian Lowitt,  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 and then others who you would see as potential  
3 16 files. But there is a relatively small group  
4 of officers of Holdings who could sign for the  
5 parent company.

6 **Q. Okay. So --**

7 A. So Skip McGee, for instance, was not  
8 an officer of Lehman Brothers Holdings.

9 **Q. I gotcha. And you sign it on the**  
10 **16th, early morning of the 16th? "It" being the**  
11 **Asset Purchase Agreement.**

12 A. 16th is Tuesday?

13 **Q. Yes.**

14 A. I don't recall if it was early morning  
15 or later in the day after an all-nigher. I  
16 don't remember the exact time.

17 **Q. I'm going to give you something I**  
18 **never go anywhere without. It's a blank**  
19 **calendar of the week. It's of the month of**  
20 **September 2008. I'll show you which are the**  
21 **Tuesdays and which are the Wednesdays.**

22 A. All right. I don't remember what  
23 point of the day on the 16th, but it needed to  
24 be signed --

25 **Q. Right.**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 A. -- so that it was signed for the  
3 hearing, the bankruptcy court hearing on that  
4 day.

5 **Q. Okay. Okay.**

6 A. So we were under some time pressure to  
7 actually have a signed document to go into court  
8 with.

9 **Q. All right. Now, and then when the**  
10 **time comes during the week for the First**  
11 **Amendment to be signed and either on the Sunday**  
12 **or Monday the clarification letter to be signed,**  
13 **the reason you signed it is consistency; you**  
14 **signed the first one?**

15 A. Weil Gotshal brings, you signed the  
16 first one, here's the amendment, here's the  
17 clarification. To clarify, there were some  
18 elements of the clarification that I had more  
19 involvement in, but I was much -- and not the  
20 part you were asking about, not the financings  
21 and the repo and the assets that are going over,  
22 but things along the lines of should this  
23 subsidiary go in or be out, what businesses are  
24 transferring.

25 **Q. Right.**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 A. I spent a lot more time, my time,  
3 during that week with things that, you know, in  
4 hindsight, might seem not all that significant,  
5 but were the South American retail businesses  
6 going, was Eagle Energy going, was the Israeli  
7 office going.

8 **Q. Canada was another issue?**

9 A. IMD, Canada. So there was a lot of my  
10 time on what were the, not the securities  
11 position, but what were the businesses that were  
12 being brought into the deal.

13 **Q. Now, when IMD was an issue, whether or**  
14 **not IMD was going over, there was an issue as to**  
15 **whether additional employees from IMD should be**  
16 **included in the preexisting bonus pool that was**  
17 **referred to or whether additional funds would be**  
18 **set aside; is that right?**

19 A. I don't recall that. I was not part  
20 of those discussions.

21 **Q. Well, let's go through some changes --**  
22 **some provisions in the clarification letter.**  
23 **Let me get a sense of what your knowledge is of**  
24 **both the reason for these and the history of**  
25 **them, okay?**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 **We dealt with paragraph 9. Let's take**  
3 **a look at paragraph 13, please. It's at page 5.**  
4 **Let me know when you've had a chance to read**  
5 **that page.**

6 **(Document review.)**

7 A. Okay.

8 **Q. Okay. You've had chance to look that**  
9 **through?**

10 A. Yes.

11 **Q. You see in there the following**  
12 **language: "Effective at closing, all" -- let me**  
13 **start that again. "Effective at closing (i) all**  
14 **securities and other assets held by Purchaser**  
15 **under the September 18, 2008 Repurchase**  
16 **Agreement among Purchaser and/or its Affiliates**  
17 **and LBI and/or its Affiliates and Bank of New**  
18 **York as Collateral Agent, defined as the**  
19 **Barclays Repurchase Agreement, shall be deemed**  
20 **to constitute part of the Purchased Assets in**  
21 **accordance with paragraph 1(A)(ii) above." And**  
22 **that's only part of the paragraph.**

23 **Any knowledge, sir, as to why the**  
24 **assets that were with the collateral agent for**  
25 **the Barclays Repurchase Agreement were deemed to**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 constitute part of the purchased assets?  
3 A. No.  
4 Q. None at all? You're pausing a little  
5 bit there.  
6 A. No, not really. I mean, the provision  
7 seemed to fit, but I'm reading the agreement the  
8 same as you are. I don't have any other  
9 knowledge of it.  
10 Q. Okay. And further down, there is the  
11 following quote: "Additionally, the Notice of  
12 Termination relating to the Barclays Repurchase  
13 Agreement dated September 19, 2008, is hereby  
14 deemed rescinded and void ab initio in all  
15 respects." You see that language?  
16 A. Yes.  
17 Q. Do you have any understanding as to  
18 why the Notice of Termination needed to be  
19 rescinded and void ab initio in all respects?  
20 A. No.  
21 (Exhibit 27, a document bearing Bates  
22 Nos. BCI-EX-00109164 through 109165, marked  
23 for identification, as of this date.)  
24 Q. I have marked as Exhibit 27, Mr.  
25 Berkenfeld, a two-page document bearing Bates  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 Q. Yes. That's the September 18 e-mail  
3 from Reilly to Lowitt, and again, I'm directing  
4 your attention down to its paragraph 3. We  
5 talked about this before. It had the language  
6 about a block discount. You see where I am?  
7 A. Uh-huh.  
8 Q. And there's this sentence -- well,  
9 let's me read the first two sentences of that  
10 paragraph. "Not clear on the amount of block  
11 discount or how we make it happen. Defaulting  
12 on repo could be the best, as discount could be  
13 taken from the haircut."  
14 Any understanding of what that  
15 sentence means?  
16 A. None.  
17 Q. I might be able to give you what my  
18 partner calls the gift of time with the  
19 following question.  
20 Do you know how repo works?  
21 A. Generally.  
22 Q. Okay. Was that within your area of  
23 responsibility?  
24 A. No.  
25 Q. And so I'm clear, was it within your  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 number BCI-EX-00109164 through 65.  
3 Take a look at it, please, and tell me  
4 if you've ever seen this document before.  
5 A. I've never seen it before.  
6 Q. You can put it aside. Nothing further  
7 on that.  
8 Do you have any recollection of when,  
9 if at all, during the -- I keep calling it a  
10 week, but during the six days between Tuesday,  
11 the 16th, and Monday, the 22nd, at the closing,  
12 when during that week a concept of terminating  
13 or otherwise adjusting the parties' rights under  
14 a Repurchase Agreement was an issue?  
15 A. I don't recall at all. I really had  
16 very little -- no involvement in the whole  
17 financing, repo arrangement.  
18 Q. Do you have any knowledge of whether  
19 the repo arrangement was used as a mechanism to  
20 transfer to Barclays Lehman assets at a  
21 discount?  
22 A. I have no knowledge.  
23 Q. Would you take a look at Exhibit 21,  
24 which is in the pile in front of you.  
25 A. Oh, Exhibit 21?  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 area of responsibility back in the days before  
3 the bankruptcy, or the responsibilities that you  
4 had in connection with the bankruptcy and the  
5 making of these agreements?  
6 A. In the 21 years I was at Lehman, it  
7 was never in the area of my responsibility. It  
8 was an area, a specialized area, that I really  
9 had very little familiarity with.  
10 MR. STERN: Bob, at some point if you  
11 want to take a break to sort through notes.  
12 MR. GAFFEY: Now might not be a bad  
13 time, because I think, based on the last  
14 couple of minutes, I may be able to cut some  
15 stuff out.  
16 (Recess; Time Noted: 1:48 P.M.)  
17 (Time Noted: 1:54 P.M.)  
18 BY MR. GAFFEY:  
19 Q. I think you made a reference earlier  
20 today, Mr. Berkenfeld, and if not, let me  
21 introduce the topic: Was there a point in  
22 between the 16th and the 22nd where it became  
23 evident or known to you or told to you that  
24 Lehman would not be able to deliver to Barclays  
25 all of the assets that had been considered for  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 transfer as part of the Asset Purchase  
3 Agreement, that they couldn't get their hand on  
4 what was supposed to go over to Barclays?  
5 A. I really wasn't a part of all of those  
6 discussions --  
7 Q. Uh-huh.  
8 A. -- resolving those issues.  
9 Q. Right.  
10 A. So I don't recall really being in the  
11 loop on that.  
12 Q. What we talked about a bit before is  
13 you discovered in court on the 19th the change  
14 from 70 to what you thought was about 42, right?  
15 And I think I asked you, and rather than go look  
16 for it, I think I asked you if you had a sense  
17 of that was a diminution in value of the  
18 existing classes of assets or a reduction in the  
19 total number of assets being transferred, and  
20 you didn't know one way or the other?  
21 A. I wouldn't know one way or the other.  
22 Q. There were -- and again, for the sake  
23 of efficiency, I'll set a factual basis here so  
24 you'll understand the topic that I want to ask  
25 you about.

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 assets held in LBI's clearance boxes as of the  
3 time of closing, which at the close of business  
4 on September 21, 2008 were as specified on  
5 Schedule B, previously delivered by Seller and  
6 accepted by Purchaser," blah, blah, blah.  
7 When you signed the letter, did you  
8 have an understanding of what was meant by the  
9 "assets held in LBI's clearing boxes"?  
10 A. No more so than it's described in the  
11 agreement.  
12 Q. And the agreement itself says "no  
13 extraneous knowledge of it"?  
14 A. No. That's a good way to put it.  
15 Thank you.  
16 Q. As you sit here today, do you know  
17 what clearance boxes are being referred to  
18 there?  
19 A. I do not.  
20 Q. As you sit here today, have you ever  
21 seen the Schedule B to which the letter you  
22 signed referred?  
23 A. Not that I recall.  
24 Q. And as you sit here today, have you  
25 ever seen the Schedule A that the clarification

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 We've seen some documents that discuss  
3 efforts to find additional collateral,  
4 additional securities to send over to Barclays.  
5 Is that a topic that hit your screen that you  
6 were involved with in any way?  
7 A. I wasn't involved with it.  
8 Q. Do you have any knowledge about, for  
9 example, looking for what are called 15c3  
10 securities?  
11 A. I wasn't involved in any of that. I  
12 was not involved in any of that.  
13 Q. Did you hear anything about that?  
14 A. Nothing that I can recall  
15 specifically.  
16 Q. Similarly, were you involved or did  
17 you come to have any knowledge about an effort  
18 to find securities in clearance boxes that could  
19 be turned over from Lehman to Barclays?  
20 A. I wasn't involved in any of those  
21 discussions.  
22 Q. So, back to the clarification letter,  
23 in paragraph 1(A)(ii), where the definition of  
24 "purchased assets" is changed to include, and  
25 now I'm quoting, "(B) such securities and other

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 letter you signed refers to?  
3 A. I don't recall.  
4 Q. Take a look, if you would -- I'm over  
5 on page 2 at subsection 3 of paragraph 1(A),  
6 referring to the equity of Lehman Brothers  
7 Canada, Lehman Brothers South America, Lehman  
8 Brothers Uruguay, S.A., you see that?  
9 A. Yes.  
10 Q. That's one of the issues you were  
11 involved in, what's going, what's not going?  
12 A. Yes.  
13 Q. But when you were involved in what's  
14 going and what's not going, it was not with  
15 respect to the securities that were transferred,  
16 it was respect to other things, which parts of  
17 the business that were going?  
18 A. It was, when I was involved, the  
19 business points of this clarification letter  
20 that I was involved in had more to do with what  
21 businesses were going.  
22 Q. Okay.  
23 A. Meaning was the Canadian business  
24 going, was the South American business going.  
25 That happened to be housed in these

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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 subsidiaries. Like, in order to transfer the  
3 business, you needed to transfer the  
4 subsidiaries.

5       I didn't really have -- I didn't have  
6 involvement in the securities that were being  
7 transferred and the financing of it and what was  
8 happening with the Fed and JPMorgan and  
9 Barclays. I didn't have any involvement in  
10 that.

11       **Q. During the weekend of the 20th and the**  
12 **21st, did it come -- withdrawn. At any time in**  
13 **between the signing and the closing, did it come**  
14 **to your attention that there were -- there was**  
15 **an issue with respect to -- just answer this yes**  
16 **or no, please -- that there was an issue with**  
17 **respect to JPMorgan that could be an obstacle to**  
18 **completing the closing?**

19       A. Yes.

20       **Q. And describe for me, if you would,**  
21 **what the issue was, as you understood it?**

22       A. That's difficult to do because it's a  
23 while ago and I wasn't directly involved, but I  
24 was at Weil Gotshal on Sunday and there were  
25 three-way negotiations going on between the Fed,  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 JPMorgan and Barclays that to some extent it  
3 would be fairly characterized as Lehman not  
4 really being at the table on those.

5       But, as a matter of fact, there were  
6 negotiations going on in separate rooms between  
7 Barclays and JPMorgan to sort that out that no  
8 representative of Lehman Brothers was included  
9 in. So I don't know what the nature of the  
10 issue really was.

11       MR. STERN: When your questions ask  
12 about the time period between the signing  
13 and the closing --

14       MR. GAFFEY: Between the 16th and  
15 22nd.

16       MR. STERN: Okay.

17       **Q. Were there also separate discussions,**  
18 **not involving Lehman, between Barclays and DTC?**

19       A. I wouldn't know firsthand. I believe  
20 there were, but I don't know what they were and  
21 when they were.

22       **Q. Why do you believe there were?**

23       A. I just believe there were. I don't  
24 know why.

25       **Q. Totally apart from anything else I**  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 have asked you up till now, I should have asked  
3 you this before, since you went over to  
4 Barclays, and other than in conversations with  
5 Barclays' counsel, which I don't want to know  
6 about, have you had discussions with Barclays  
7 personnel, Barclays legacy personnel that didn't  
8 transfer over from Lehman, about the deal and  
9 the events of that week and how the deal went  
10 and whether Barclays got what it paid for and  
11 other similar topics?

12       A. No. No, I have not. I can't recall  
13 any conversations like that.

14       **Q. And again, you're being a little**  
15 **emphatic with your answer on that. Is that**  
16 **because -- have you deliberately not had those**  
17 **conversations or it just hasn't happened?**

18       A. It's not because I deliberately  
19 haven't had it. I just was never -- no one on  
20 the other side ever had those conversations with  
21 me.

22       **Q. And in the initial period of your**  
23 **employ by Barclays, let's call it the first week**  
24 **or two after you go over to Barclays, are you**  
25 **drawn into or involved in any discussions about**

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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **implementation issues: Did the assets make it**  
3 **over here? Did the right people get over here?**

4       A. I spent a lot of my time initially  
5 after the closing on continuing Lehman issues,  
6 for instance, negotiating the Neuberger  
7 transaction. Again, this was a situation where  
8 there was no one else that was interested in  
9 doing it or willing to do it, so I spent another  
10 week at Weil Gotshal on that transaction.

11       Later on, a few weeks later, I was  
12 involved to some extent, and for a limited  
13 period of time, on the issue of clients'  
14 securities getting moved over and the issue with  
15 the DTC there. It was really about -- it was  
16 really about client issues.

17       **Q. Right.**

18       A. Client accounts that might not have  
19 gotten whatever, the munis or the treasuries,  
20 that were supposed to go over and where were  
21 those securities and how were we going to deal  
22 with that particular issue.

23       **Q. Generally put, so I can maybe move**  
24 **this off the table of things I need to ask you**  
25 **about, when you say that, you're talking about**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 the segregated assets that are in client  
3 accounts, making sure they were safely ACATed  
4 other otherwise moved over to Barclays?  
5 A. There was issues with the S.E.C., with  
6 Hughes Hubbard, with DTC, you know, all that,  
7 were the clients' assets in their accounts being  
8 made whole. So I was involved in that part of  
9 it, but if I understand your question correctly,  
10 it's not what you were asking about.  
11 I really wasn't involved at all on  
12 whether -- I didn't switch hats and become part  
13 of Barclays and say where are those assets that  
14 should have come from Lehman? I wasn't involved  
15 in anything like that.  
16 **Q. I don't mean taking Barclays' side of**  
17 **anything.**  
18 A. No, I mean I wasn't involved in that  
19 on either side.  
20 **Q. I'm going to give you a series of**  
21 **drafts of the clarification letter and ask you**  
22 **to look through them and then, in one form or**  
23 **another, let's go through them and you can just**  
24 **tell me if you've seen them before and if it**  
25 **refreshes your recollection about some stuff.**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 Nos. 10279028 through 10279851, marked for  
3 identification, as of this date.)  
4 (Exhibit 35, a document bearing Bates  
5 Nos. 10284822 and 10279863 through 10279864,  
6 marked for identification, as of this date.)  
7 (Exhibit 36, a document bearing Bates  
8 Nos. BCI-CG00024252 through 24271, marked  
9 for identification, as of this date.)  
10 (Exhibit 37, a document bearing Bates  
11 Nos. BCI-CG00024954 through 24973, marked  
12 for identification, as of this date.)  
13 (Exhibit 38, a document bearing Bates  
14 Nos. 10283756 with attachments, marked for  
15 identification, as of this date.)  
16 A. Okay.  
17 **Q. Okay.**  
18 A. Certainly got a lot longer.  
19 **Q. The letter?**  
20 A. Yes.  
21 **Q. Well, somebody's shown you my outline.**  
22 **The first one that I have put before**  
23 **you which we have marked as Exhibit 28 is a**  
24 **draft of the clarification letter under an**  
25 **e-mail from a Lillian Raben dated September 17,**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 That's what I want to do for the next sort of  
3 sequence here, but I want all the documents in  
4 front of you at once, okay?  
5 A. Okay.  
6 (Exhibit 28, a document bearing Bates  
7 Nos. BCI-CG00011047 through 11050, marked  
8 for identification, as of this date.)  
9 (Exhibit 29, a document bearing Bates  
10 Nos. 10284821 through 10279830, marked for  
11 identification, as of this date.)  
12 (Exhibit 30, an e-mail string, the  
13 first of which from P. Dowd to A. Keller, et  
14 al., marked for identification, as of this  
15 date.)  
16 (Exhibit 31, a document bearing Bates  
17 Nos. 10279029 through 10279862, marked for  
18 identification, as of this date.)  
19 (Exhibit 32, a document bearing Bates  
20 Nos. BCI-EX-00059913 through 59929, marked  
21 for identification, as of this date.)  
22 (Exhibit 33, a document bearing Bates  
23 Nos. 10284801 through 10286514, marked for  
24 identification, as of this date.)  
25 (Exhibit 34, a document bearing Bates  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **2008 to Archie Cox, Steven Berkenfeld and others**  
3 **from Victor Lewkow. Bears Bates numbers**  
4 **BCI-CG00011047 through 11050.**  
5 **Any independent recollection of seeing**  
6 **that document before, Mr. Berkenfeld?**  
7 A. It's e-mailed to me, but I don't know  
8 that I spent any time substantively with it.  
9 **Q. Okay. And two things I wanted to ask**  
10 **you about that. One is compared to the final**  
11 **that you signed on either the Sunday night or**  
12 **the Monday, it's a much shorter clarification**  
13 **letter, correct?**  
14 A. Yes.  
15 **Q. And I take note of the fact that a**  
16 **clarification letter of any kind is being**  
17 **prepared as early as September 17. Is there a**  
18 **reason a clarification letter started to be**  
19 **prepared that soon after the signing of the**  
20 **Asset Purchase Agreement?**  
21 A. I don't recall. I don't recall why it  
22 was started that early.  
23 **Q. Okay. And I will tell you, although,**  
24 **you know, we're all sort of still looking for**  
25 **and at documents, this is the earliest version I**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 have found, and it is a Cleary Gottlieb draft,  
3 as denoted by its header.

4 Does that refresh -- well, do you have  
5 any knowledge, sir, of whose idea it was that a  
6 clarification letter would need to be done? Did  
7 it emanate with Cleary?

8 A. I don't recall.

9 **Q.** Now, the next exhibit, number 29, is a  
10 draft of the clarification letter under an  
11 e-mail from David Murgio at Weil to Berkenfeld,  
12 Steven, and then a distribution list. And it  
13 attaches in the bottom e-mail, there's a  
14 redaction of a communication from Mr. Murgio to  
15 you, but in the e-mail at the bottom, he simply  
16 is forwarding an e-mail that he also sent to  
17 Lillian with their Weil comments on that letter.

18 Again, any independent recollection of  
19 seeing this?

20 A. Independent recollection as I sit here  
21 now, no.

22 **Q.** Other than the fact that it reflects  
23 it was sent to you as an e-mail?

24 A. Yes. And I do have recollection over  
25 the course of that week about the back and forth

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 about is Canada included, is IMD included, and  
3 that's reflected in some of these letters.

4 **Q.** In the drafts?

5 A. Yes.

6 **Q.** Now, the next document you have should  
7 be marked as Exhibit 30, and it should be a  
8 draft dated -- or an e-mail dated September 18,  
9 2008 at 6:43 P.M. from Andy Keller to Steve  
10 Berkenfeld entitled Revised Clarification  
11 Letter?

12 A. Uh-huh.

13 **Q.** And it transmits an e-mail that was  
14 sent both to Weil and to personnel at Barclays  
15 with further revisions of the letter. Same  
16 question: Any independent recollection apart  
17 from the fact that it reflects it was an e-mail  
18 sent to you?

19 A. No, no independent recollection, and I  
20 don't recall whether I was staying current with  
21 the drafts as they were coming through.

22 **Q.** Okay. And if you would, please, take  
23 a look at Exhibit 31, which should be an e-mail  
24 from David Murgio at Weil to Victor Lewkow at  
25 Cleary and others, including you in the CCs,

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 with a document number of 10279029 and an  
3 attachment entitled WGM Comments, September 18,  
4 7:30.

5 Same questions: Any independent  
6 recollection apart from the fact that it  
7 reflects it was sent to you as an e-mail?

8 A. No independent recollection of this  
9 draft.

10 **Q.** Now, take a look, please, at what we  
11 have marked as Exhibit 32, which is an e-mail  
12 containing a draft of a clarification letter,  
13 bearing Bates Nos. BCI-EX00059913 through 929.  
14 It's an e-mail from Jonathan Hughes to Rich  
15 Ricci and others at Barclays, and there's an  
16 e-mail chain below that.

17 Now, you're not on this chain, so --  
18 I'm going to ask you anyway, have you seen this  
19 before?

20 A. Not this e-mail, no.

21 **Q.** Okay. During that time period, now  
22 we're on the 19th, we're at the Friday, is there  
23 a point where you ceased -- where you're not  
24 getting each draft, where you're sort of out of  
25 that loop?

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 A. These are all Barclays people on this  
3 list. So this is a draft that's sent from David  
4 Murgio --

5 **Q.** Right.

6 A. -- to Victor Lewkow, Cleary Gottlieb,  
7 counsel for Barclays. He forwards it to  
8 Barclays' attorneys, Richard Smith in  
9 particular. Richard Smith focuses it to other  
10 attorneys and Jonathan Hughes gets it and gives  
11 it over to the, I guess, in his view, the key  
12 business people.

13 **Q.** Right. The reason I asked the  
14 question, go to the last e-mail in the sequence,  
15 which would be at the end of it at page 59914.

16 A. Uh-huh.

17 **Q.** Okay, you've got Murgio to Lewkow at  
18 Cleary, copy a bunch of people at Cleary? See  
19 where I am?

20 A. Yep.

21 **Q.** And you're not in that list, and it  
22 says, "Please find the redraft of the clarifying  
23 letter," right?

24 A. I don't know why I'm not on the list.

25 **Q.** This is sort of a more general

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 question that springs out of this document, at  
3 least in my mind. Is there a point where you're  
4 no longer seeing drafts? As opposed to, you  
5 know, maybe not seeing a draft here and there,  
6 is there a point where the drafts stop coming to  
7 you?  
8 A. I don't recall.  
9 Q. Okay. Do you have any recollection of  
10 that occurring to you at the time?  
11 A. I don't recall any deliberate event or  
12 demarcation that said don't send me drafts  
13 anymore. I don't know why.  
14 Q. Actually, that's a better question  
15 than the one I'm asking. Did you ever say I  
16 don't want to see drafts of this any more?  
17 A. No, I did not.  
18 Q. Exhibit 33 should be an e-mail dated  
19 September 19, 2008 from Andy Keller to  
20 Berkenfeld and Emma Bailey regarding CGSH  
21 comments on the clarifying letter, and it simply  
22 forwards an e-mail from Robert Davis to Robert  
23 Murgio and others, including people at both  
24 Barclays and Lehman.  
25 This has got attached to it a  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 was all the way down on Bowling Green, and  
3 people were there pretty far ahead of the actual  
4 commencement of the proceeding.  
5 Q. When you're down there, are you -- did  
6 you ask anybody where are we on the  
7 clarification letter?  
8 A. Not that I recall. I also had my  
9 BlackBerry checked with security.  
10 Q. You had one with a phone?  
11 A. Uh-huh.  
12 Q. Okay. If you take a look, Mr.  
13 Berkenfeld, at Exhibit 34, it should be an  
14 e-mail from Keller to Berkenfeld forwarding an  
15 e-mail from Messineo to Lewkow and a  
16 distribution list. The text of that e-mail  
17 says, quote --  
18 Well, actually, the same question.  
19 Seen it before? Any independent recollection?  
20 A. No independent recollection.  
21 Q. The text of the e-mail that Mr. Keller  
22 is forwarding says, "Please see the current  
23 draft. The exhibit must be revised to reflect  
24 the latest deal with DTC. This is being  
25 distributed separately. A copy marked to show  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 handwritten CGSH markup of 9:19 A.M. Do you see  
3 that?  
4 A. I do.  
5 Q. This one at least looks different than  
6 the others. Any recollection of seeing that  
7 document?  
8 A. No, no recollection.  
9 At this point, also, at 1:20 on  
10 Friday, I'm not sure when things started at  
11 bankruptcy court.  
12 Q. Okay. That's a good point. I mean, I  
13 guess you're in bankruptcy court from the  
14 beginning to the end of the hearing. We  
15 established that before, right?  
16 A. Yes.  
17 Q. And the hearing I think started at  
18 least midmorning. It's not an afternoon  
19 hearing?  
20 A. I don't remember when it started.  
21 Q. Okay.  
22 MR. STERN: I'm sorry. Let's go off  
23 the record for a second.  
24 (Discussion off the record.)  
25 A. I left earlier to get down there. It  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 the changes made from the last draft we  
3 distributed is attached."  
4 Do you know what is meant by a  
5 reference to the latest deal with DTC?  
6 A. I don't.  
7 Q. Any clue at all what that's a  
8 reference to?  
9 A. No.  
10 Q. I take it from your answers about  
11 these that you would not have any idea at what  
12 point in the sequence it was determined to take  
13 the price adjustment provision out, right,  
14 whether it was the Wednesday or the Thursday or  
15 the Saturday or the Sunday?  
16 A. I have no recollection of that.  
17 Q. And if you would look, please -- we're  
18 up to Exhibit 35, yes?  
19 A. Yes.  
20 Q. Exhibit 35 should be an e-mail from  
21 Murgio dated September 19, 2008, 9:15 P.M.,  
22 Greenwich Mean Time, to Dowd, P. Martelli,  
23 Steven Berkenfeld, Victor Lewkow at Cleary, and  
24 others.  
25 Same questions: Any independent  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **recollection of seeing it?**  
3 A. No independent recollection.  
4 **Q. And the text of that e-mail refers to,**  
5 **"A revised version of the clarification letter**  
6 **reflecting our conversation this afternoon."**  
7 **Were you part of any such conversation**  
8 **on the afternoon of Friday, September 19?**  
9 A. Not that I recall. This is an e-mail  
10 that went to both Lehman and Barclays personnel  
11 and counsel for both sides, so I don't know what  
12 conversation he's referring to.  
13 **Q. Okay. Take a look at Exhibit 36, an**  
14 **e-mail from Robert Messineo to Victor Lewkow,**  
15 **bearing Bates No. BCI-CG00024252 through 24271.**  
16 **Again, sir, you're not reflected as a**  
17 **recipient of this e-mail, but my question is**  
18 **have you ever seen this version of it before?**  
19 A. I don't know. I don't have  
20 independent memory of it.  
21 **Q. Okay. Now we're into Saturday,**  
22 **however. The hearing is over. It's 2:39 P.M.**  
23 **on Saturday.**  
24 **Are you in any way back involved in**  
25 **reviewing drafts of the clarification letter now**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **that the hearing is over?**  
3 A. I don't recall at this point whether I  
4 was involved on Saturday or whether I didn't get  
5 involved again until Sunday.  
6 **Q. Okay.**  
7 A. I just don't recall.  
8 **Q. All right. And would you take a look**  
9 **at Exhibit 37.**  
10 A. Yes.  
11 **Q. 37 is an e-mail from David -- I can't**  
12 **pronounce that -- Leinwand, Linewand, to Andy**  
13 **Keller, David Murgio, some folks at Sullivan and**  
14 **Cromwell, some folks at Barclays, and some folks**  
15 **at Cleary, but again, you're not shown as having**  
16 **seen this e-mail bearing a date of Saturday,**  
17 **September 20, at 11:13 P.M. Any recollection of**  
18 **seeing it?**  
19 A. No recollection.  
20 **Q. Any recollection of activity going on**  
21 **with respect to changes in the -- with respect**  
22 **to the clarification letter as late as September**  
23 **20th, 11:13 P.M.?**  
24 A. I don't know what it would have been  
25 covering.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Q. Now, Exhibit 38, Mr. Berkenfeld,**  
3 **before you is an e-mail from Steven Berkenfeld**  
4 **at Lehman.com to berkenf@optonline.com, and**  
5 **attaches a draft of the clarification letter**  
6 **entitled WGM Draft, September 19, 2008, 7:30**  
7 **P.M.**  
8 **And the e-mail reflects your -- I take**  
9 **it this is you sending a copy to your personal**  
10 **e-mail address?**  
11 A. My home address, correct.  
12 **Q. And this reflects that that was sent**  
13 **on Sunday, September 21, at 11:19 A.M. Do you**  
14 **have any recollection of sending a copy of the**  
15 **clarification letter to yourself?**  
16 A. I don't recall, but I would do this so  
17 I could print it out. From my work e-mail to my  
18 home so I could print it out and read it.  
19 **Q. I assume at some point you got to get**  
20 **some sleep and you got to head home every once**  
21 **in a while. Do you recall leaving on the Sunday**  
22 **at about 11:19, sending stuff to yourself at**  
23 **home in preparation for leaving and being at**  
24 **home?**  
25 A. No, I think it was -- my recollection  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **is it was the other way around. I was printing**  
3 **stuff out in anticipation of going back in to**  
4 **Weil Gotshal.**  
5 **Q. Okay. So you're home, you sign onto**  
6 **your Lehman e-mail, you send it to your**  
7 **optonline and print it out?**  
8 A. My BlackBerry, but, yeah, I sent it to  
9 my memo, print it out, and was expecting to go  
10 in later that day.  
11 **Q. Physically, it's most likely you're at**  
12 **home when you do this?**  
13 A. That's most likely right.  
14 **Q. The draft that you have sent to**  
15 **yourself here on Sunday, September 21, at 11:19**  
16 **is the Weil Gotshal draft from September 19,**  
17 **2008. The last couple of exhibits that we have**  
18 **looked at have been sent over the Saturday and**  
19 **the Sunday. The 19th is the Friday.**  
20 **Does that -- I would say "refresh,"**  
21 **but does that refresh or freshen your view about**  
22 **whether you saw copies of the clarification**  
23 **letter over the weekend?**  
24 A. It's speculation.  
25 **Q. Uh-huh.**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. I don't remember, but it would have  
3 been most likely to have sent to myself the last  
4 draft I had.  
5 **Q. That you had, okay.**  
6 Now, tell me what happens-tow lowing  
7 is on the Monday, the day the 22?  
8 A. As I recall, yes, very early in the  
9 morning.  
10 **Q. And where was the closing?**  
11 A. At Weil Gotshal.  
12 **Q. Did you go to the closing?**  
13 A. Yes.  
14 **Q. When you got to the closing, when you**  
15 **got to the closing, do you recall if you signed**  
16 **the clarification letter there? We talked**  
17 **before about whether you might have signed it**  
18 **Sunday night. But now having gone through this**  
19 **sequence, do you have a better recollection of**  
20 **when you signed it?**  
21 A. Both Sunday night and Monday morning  
22 were at Weil Gotshal.  
23 **Q. Uh-huh.**  
24 A. Then it changed locations. So I went  
25 in to Weil Gotshal on Sunday and stayed there  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Q. Is Beth Rudofker a lawyer?**  
3 A. No, she's not.  
4 (Exhibit 39, e-mail from S. Berkenfeld  
5 to Beth Rudofker dated Saturday, September  
6 20, at 1:07 P.M., marked for identification,  
7 as of this date.)  
8 **Q. Mr. Berkenfeld, I've shown you what we**  
9 **have marked as Exhibit 39. It's a two-page**  
10 **e-mail and it, at the top of the first page, it**  
11 **reflects an e-mail from you to Beth Rudofker**  
12 **dated Saturday, September 20, at 1:07 P.M., and**  
13 **there follows an e-mail chain below that. Have**  
14 **you had a chance to look through that?**  
15 A. Yes.  
16 **Q. Do you recall this e-mail exchange**  
17 **with Ms. Rudofker?**  
18 A. I don't recall the e-mail exchange.  
19 **Q. I note that the earliest of the**  
20 **e-mails, which of course would be the last one**  
21 **on the last page, sent Friday, September 19, at**  
22 **4:46, that is, 16:46, simply says in the subject**  
23 **line, "The whole structure of what we were**  
24 **planning has changed and there is huge**  
25 **confusion." Do you recall receiving that**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 through the night until the closing Monday  
3 morning.  
4 **Q. Okay. When you put your signature to**  
5 **the clarification letter, is there a point at**  
6 **which you say to someone, what changes does this**  
7 **make to the deal I signed on the 16th?**  
8 A. I don't recall having a conversation.  
9 I recall having read that the -- a letter and  
10 going through it with counsel from Simpson and  
11 Weil Gotshal.  
12 **Q. Uh-huh. Just answer this yes or no.**  
13 **Did you ask about each and every section of the**  
14 **letter before you signed it?**  
15 A. Just yes or no?  
16 **Q. Yes.**  
17 A. No.  
18 **Q. Do you know a Beth Rudofker?**  
19 A. Yes. Rudofker.  
20 **Q. Who's Beth Rudofker?**  
21 A. Beth Rudofker was the head of Audit at  
22 Lehman Brothers.  
23 **Q. Right.**  
24 A. And is now in the Compliance  
25 Department at Barclays.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **message from Ms. Rudofker?**  
3 A. I don't, but reading this, I guess I  
4 didn't get it till -- it's done in European  
5 time. I didn't respond until 2:28 in the  
6 morning.  
7 **Q. Okay. Now, at 2:28 on the morning of**  
8 **Saturday, September 20, the hearing has ended,**  
9 **right? It ended shortly after midnight. And**  
10 **presumably because this is a response from you**  
11 **to Ms. Rudofker, you're back in front of a**  
12 **screen of some kind, a BlackBerry or you're in**  
13 **front of a computer screen somewhere. You're no**  
14 **longer in court, right?**  
15 A. I think that's a fair assumption, yes.  
16 **Q. And you respond to Ms. Rudofker in**  
17 **response to her note, "The whole structure of**  
18 **what we were planning has changed and there is**  
19 **huge confusion," you write only, "Still,"**  
20 **question mark. What are you referring to when**  
21 **you write to her?**  
22 A. I don't recall.  
23 **Q. Okay.**  
24 A. I just didn't understand what the  
25 issue was.  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 Q. Well, "still" suggests to me there was  
3 a point of confusion that you had some earlier  
4 knowledge of?

5 A. I wouldn't interpret it that way.

6 Q. How would you interpret it?

7 A. Just, you know, at this point we still  
8 have issues. Not that there was an issue  
9 before, just at this point there's still an  
10 issue.

11 Q. Well, as a man who had been working  
12 virtually nonstop on this deal since the 15th,  
13 doing all-nighters, and you get a message after  
14 you've come out of the bankruptcy court that  
15 says only, "The whole structure of what we were  
16 planning has changed and there is huge  
17 confusion," that would have been a matter of  
18 some significant concern to you, would it not?

19 MR. STERN: Objection to the form.

20 A. Not necessarily.

21 Q. So, as you sit here today, do you have  
22 any recollection of learning sometime late  
23 Friday, early the Saturday that the whole  
24 structure of what you were planning had changed  
25 and there was huge confusion?

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD

2 A. I don't have any recollection on late  
3 Friday. I don't have any recollection early in  
4 the morning Saturday. To some extent, you asked  
5 me if I know Beth, and I do know Beth, and I  
6 would have not necessarily thought that this was  
7 a significant issue, knowing Beth.

8 Q. Okay. Does Beth tend to write -- do  
9 you tend to discount a note like that from Beth  
10 until you get details; is that what you're  
11 telling me?

12 A. I would characterize Beth as sometimes  
13 being somewhat of an alarmist over the many  
14 years I've known her, and that a note like this  
15 could easily be exaggerated because she might  
16 not have been in the loop on something that was  
17 being done somewhere else or away from her.

18 So I would not have taken a note from  
19 Beth at face value that if she said there's huge  
20 confusion, that there truly was huge confusion,  
21 that there just might have been confusion in her  
22 mind. So that's why I said not necessarily.

23 Q. All right. Now, let me just focus  
24 your attention. If you turn to the first page  
25 of the exhibit, which is the last two e-mail

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 exchanges in the sequence, you write to Beth,  
3 "How to reach you?" And she responds with a  
4 telephone number, correct?

5 A. Correct.

6 Q. Do you recall having a telephone  
7 conversation with her on the afternoon of  
8 Saturday?

9 A. I don't recall having it. I would  
10 expect that I did because I would have called  
11 her, but I don't recall the conversation.

12 Q. Thanks.

13 (Exhibit 40, a document bearing Bates  
14 Nos. STB-LEH0000272 through 277, marked for  
15 identification, as of this date.)

16 Q. We've marked as Exhibit 40, Mr.  
17 Berkenfeld, a multi-page document bearing Bates  
18 numbers STB-LEH0000272 through 277.

19 Take a look through that and tell me  
20 whether you have seen that before. It is, for  
21 the record, an e-mail at the top of the -- on  
22 the first page it reflects an e-mail from Robert  
23 Davis at Cleary Gottlieb to David Murgio at  
24 Weil, CC, Alvin Brown, A. Kohn, Archie Cox,  
25 others, and sberkenfeld@lehmanbrothers.com?

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD

2 MR. STERN: This is a fairly lengthy  
3 series of e-mails and it's a little  
4 difficult to read. Is there a particular  
5 section you want to focus on or do you  
6 want -- should he just read the whole thing  
7 and then --

8 MR. GAFFEY: Actually, most of --

9 Q. What I would like you to do, Mr.  
10 Berkenfeld, is do whatever you need to do to  
11 answer the question which you know I'm going to  
12 ask, which is have you seen this before. You  
13 don't need to study each part of it.

14 MR. GAFFEY: And then I have some  
15 questions about the last e-mail in the  
16 sequence, Jack. That's the last one at the  
17 top of the first page.

18 A. I don't have any recollection of this  
19 independently.

20 Q. You see there are four numbered items  
21 in Mr. Davis' e-mail to Murgio and the people  
22 who received copies of this?

23 A. Yes.

24 Q. And one of them is an issue you  
25 mentioned before, the PIM business. That's an

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 issue you were -- whether the PIM business was  
3 going or not going is an issue that you were  
4 addressing in some fashion at this time, right?  
5 A. It was an issue I was involved in.  
6 Q. And there's a reference in Mr. Davis'  
7 e-mail to Mr. Murgio about the PIM business  
8 including an additional nine real estate leases.  
9 Did you get at that level of detail in what or  
10 who in the PIM business was moving over?  
11 A. Not to the extent of how many leases  
12 were going, but on kind of a broader basis.  
13 Were they taking the whole PIM business.  
14 Q. The same question I'll ask you with  
15 respect to paragraph 2 that refers to IRA  
16 accounts of PIM employees, but no preclosing IRA  
17 liabilities?  
18 A. Yeah, I don't recall that issue.  
19 Q. And then there's a reference on the  
20 signed contracts, but what I really want to ask  
21 you about is paragraph 4: "The business people  
22 at Barclays have yet to confirm to me anything  
23 about the new deal," and that's in quotes, "on  
24 the tri-party repo you described before."  
25 Does that refresh your recollection  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. I -- I don't know. Again, this was at  
3 9:56 that Friday, so I don't know when I would  
4 have seen it.  
5 Q. And --  
6 A. I never focused on it.  
7 Q. -- at 9:56 on Friday, you would have  
8 still been in court?  
9 A. I was still in court.  
10 Q. And when you come out of court, you  
11 would review your e-mails?  
12 A. Yes.  
13 Q. And any recollection on seeing an  
14 e-mail when you came out of court that night  
15 that referred to a new deal?  
16 A. I don't even have a recollection of  
17 how I got home that night.  
18 Q. Okay.  
19 (Exhibit 41, a document bearing Bates  
20 Nos. 10266839 with attachment, marked for  
21 identification, as of this date.)  
22 Q. Mr. Berkenfeld, I have put before you  
23 what we have marked as Exhibit 41, an e-mail  
24 from Anthony Collerton to Steven Berkenfeld  
25 entitled "Retention Est.xls," and it's got a  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 about what whether anybody talked about the  
3 Barclays/Lehman tri-party Repurchase Agreement  
4 to you?  
5 A. It does not. This is an e-mail to  
6 lots of people who would not have no involvement  
7 with that. Alvin Brown's an employee benefit  
8 lawyer, for instance. That was just, again, not  
9 an issue that I was directly involved in.  
10 Q. One of the CCs on this is Archie Cox,  
11 who you had described as one of the main  
12 Barclays negotiators, correct?  
13 A. Yes.  
14 Q. And you're on there as well. Who is  
15 Richard Smith? He's on there as well.  
16 A. Richard Smith is a lawyer at Barclays,  
17 in-house lawyer.  
18 Q. And you're on this list of several  
19 people as well, correct?  
20 A. Yes.  
21 Q. Had you seen this document at or  
22 around the time it was sent, September 19, 9:56  
23 P.M., and there was a reference to a new deal on  
24 a tri-party repo, would that have been an issue  
25 that would have caught your attention?  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 spreadsheet attached to it, sent on Monday,  
3 September 15th, at 4:26 P.M. GMT, which I'm told  
4 would put it at about 26 minutes past noon.  
5 There's a four-hour forward time difference, I'm  
6 just telling you.  
7 A. This is when our e-mail switched over  
8 to Barclays or something?  
9 Q. You know, it's either that or -- yeah,  
10 I don't know. I don't know. I just know it's  
11 GMT.  
12 A. Okay.  
13 Q. And what Mr. Collerton appears -- do  
14 you recall communicating with Mr. Collerton at  
15 that time very early on on September 15 about  
16 retention issues?  
17 A. I do.  
18 Q. And Mr. Collerton had some HR function  
19 at Lehman; is that correct?  
20 A. Yes, he was one of the senior HR  
21 people.  
22 Q. And he's sharing what he calls here  
23 some really rough thoughts on retention payments  
24 and severance. Do you see that?  
25 A. Yes.  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2       **Q. Do you recall this particular e-mail**  
3 **or the spreadsheet?**  
4       A. Not specifically.  
5       **Q. Do you have a more general**  
6 **recollection of communicating with Mr. Collerton**  
7 **about such issues as retention and severance?**  
8       A. Yes.  
9       **Q. Okay. I can see from his title why**  
10 **he's in that conversation. Why are you in it?**  
11       A. After the bankruptcy and, as I  
12 mentioned earlier, a lot of issues that were  
13 going on included how to deal with employees --  
14       **Q. Uh-huh.**  
15       A. -- and how to manage Lehman if we were  
16 really just going to be in bankruptcy and trying  
17 to do -- I'll put this in quotes, please -- an  
18 orderly wind-down is being requested of us from  
19 the regulators. We didn't have any idea what  
20 that meant, how we could possibly do an orderly  
21 wind-down, but we were trying to do the best we  
22 could.  
23       What we needed to try to calculate is  
24 how you get people to stick around and be part  
25 of an orderly wind-down. So some of the  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **see that?**  
3       A. Yes.  
4       **Q. And it's divided between two**  
5 **categories of entities. There would be entities**  
6 **under Holdings. I take it that's LBIH, right?**  
7 **And the LBI categories, Lehman Brothers, Inc.**  
8 **categories, yes?**  
9       A. Yes.  
10       **Q. And as you look at this, this e-mail**  
11 **that -- I'm sorry, this spreadsheet that Mr.**  
12 **Collerton sent to you, do you see that there's,**  
13 **in column E, there's a calculation called bonus?**  
14       A. Yes.  
15       **Q. All right. And the entities that are**  
16 **listed in column B, "CORP," "EQ," "FID," that's**  
17 **corporate equities, fixed income, investment**  
18 **banking, investment management, those are**  
19 **different divisions of Holdings and LBI,**  
20 **correct?**  
21       A. Yes.  
22       **Q. And the bonuses that are set out in**  
23 **Exhibit E for LBI appear to total \$2.163**  
24 **billion, do you see that?**  
25       A. No, I don't. I'm sorry. I lost you.  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 discussions I had over those couple of days is  
3 what's our, you know, biweekly payroll that  
4 we're paying out, how much cash would you need  
5 to be able to keep people employed over two-week  
6 periods so that you could keep them in their  
7 seats, engaged in whatever was necessary for us  
8 to do as we were sort of figuring it out.  
9       So this would have been an analysis  
10 that was done assuming that we were in  
11 bankruptcy and we had all these positions and we  
12 needed to wind them down and what would it take  
13 to keep people from, without trying to be overly  
14 dramatic, taking their stuff, putting it in  
15 boxes, and walking out of the building at  
16 midnight Sunday night.  
17       **Q. If you would take a look at the**  
18 **schedule that is annexed to Mr. Collerton's**  
19 **e-mail to you, I guess the issue you're talking**  
20 **about, keeping people in their seats for the**  
21 **next couple of weeks for an orderly wind-down,**  
22 **but this document appears to be talking in terms**  
23 **of bonus amounts and calculation of 50 percent**  
24 **of prior year bonus, that type of thing, if**  
25 **you'll look across the headings at the top, you**  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2       **Q. Column E?**  
3       A. Yeah.  
4       **Q. Grand total at the bottom of the LBI**  
5 **box, \$2,163,511,000?**  
6       A. 2,163,000,000.  
7       **Q. You with me?**  
8       A. Yes.  
9       **Q. And the total as between both Holdings**  
10 **and LBI comes to 2.4 billion in comp, correct?**  
11       A. Yes.  
12       **Q. Now, to your knowledge, is this broken**  
13 **down at all by the categories of employees who**  
14 **would transfer to Barclays? I mean, did all**  
15 **these business units go over to Barclays?**  
16       A. I don't think this had anything at all  
17 to do with Barclays in terms of transfers. I  
18 don't even know if this was -- that just the  
19 U.S. or global or how many businesses it  
20 included that weren't going to be moving over.  
21 I don't know.  
22       **Q. Right. Well, what I think it does**  
23 **indicate, or tell me if you agree or disagree**  
24 **with me, is whatever it is this spreadsheet is**  
25 **about, it's not about paying people for the next**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **two weeks, right?**  
3 A. No.  
4 **Q. So --**  
5 A. But I was not answering specifically  
6 around the schedule when I answered that  
7 question. It was specifically about some of the  
8 issues we were trying to resolve.  
9 **Q. Okay. Okay. And the reason I wanted**  
10 **to move you into the schedule is because I want**  
11 **to ask were you talking to Mr. Collerton at or**  
12 **around September 15 about what the bonus number**  
13 **would need to be for employees that Barclays**  
14 **wanted to retain?**  
15 A. No, I was not.  
16 **Q. Do you have any knowledge as to why**  
17 **Mr. Collerton was sending you a spreadsheet**  
18 **entitled "Potential Retention and Severance**  
19 **Estimates" that calculated bonus and then such**  
20 **things as one-third of population get 50 percent**  
21 **of prior year's bonus?**  
22 A. I don't know for sure. I'm  
23 speculating that we were thinking that we needed  
24 one-third of the staff to manage the bankrupt  
25 entity and you had to pay them a bonus to get  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **service at Lehman?**  
3 A. No, it was not.  
4 **Q. At all? Ever?**  
5 A. I don't recall any involvement in any  
6 discussion like that.  
7 **Q. You give that answer with a degree of**  
8 **certitude. The document suggests that Mr.**  
9 **Collerton seems to think you're interested in**  
10 **calculating what the bonuses would be for all**  
11 **the employees, and I say it that way just to see**  
12 **if it refreshes your recollection about whether**  
13 **you were having any discussion with Mr.**  
14 **Collerton about coming up with a way to**  
15 **calculate what would be needed for bonuses for**  
16 **transferred employees once they were at**  
17 **Barclays?**  
18 A. I did not have the conversation with  
19 Anthony that I recall about any bonuses for  
20 transferred employees. Just by way of specific  
21 example, I believe LBB stands for Lehman  
22 Brothers Bank, which was never part of the  
23 transaction at all with Barclays.  
24 **Q. So it's possible when you see "LBB" on**  
25 **here that these calculations that -- let's talk**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 them to stay.  
3 **Q. Would you pay them 50 percent of their**  
4 **prior year's bonus to stay for a couple of weeks**  
5 **for an orderly wind-down?**  
6 A. I don't think we were making an  
7 assessment about what it would take. We were  
8 just trying to plug some numbers and see what it  
9 would look like. No one had made a decision  
10 that anyone was going to be paying 50 percent.  
11 As time went by, which we didn't have  
12 as of Monday, we had the benefit of A & M coming  
13 in here and taking on a significant role and  
14 deciding who they needed and who they didn't  
15 need to. And I have no idea how many people  
16 they actually have employed.  
17 But as of Monday, in conversations  
18 with Anthony, it's like, we're bankrupt, what do  
19 we do and how do we manage this thing? And so a  
20 lot of my time over the first few days was spent  
21 trying to figure these things out.  
22 **Q. Okay. Was any of your time, though,**  
23 **spent on trying to come up with a calculation of**  
24 **how much would have to be set aside for bonuses**  
25 **for transferred employees in respect of their**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **about the LBI section of that spreadsheet. LBI**  
3 **begins with "CORP," ends with "PS," and comes to**  
4 **the \$2,163,000,000 number?**  
5 A. Uh-huh. Yes.  
6 **Q. And LBB is included in there, so**  
7 **that's 6 billion of it, or closer to 7 billion**  
8 **of it, right?**  
9 A. No, that's 6 million.  
10 **Q. 6 million, okay.**  
11 A. 7 million.  
12 **Q. Let's just use that as an example.**  
13 **That's an entity that was not contemplated as**  
14 **going over to Barclays and did not go over to**  
15 **Barclays in the deal that was discussed**  
16 **post-bankruptcy, correct?**  
17 A. I believe that the bank could not move  
18 over for regulatory reasons and was never  
19 contemplated that it would.  
20 **Q. Okay. And in the week prior to the**  
21 **bankruptcy filing, there had been discussions**  
22 **between Barclays and Lehman. I think you said**  
23 **they were merger discussions, but they**  
24 **contemplated a combination of all of Lehman**  
25 **globally with Barclays, correct?**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. Well, I do not recall what would have  
3 been done with some of the assets that created  
4 regulatory issues. There might have been  
5 provisions in there of divestitures and things  
6 like that. I don't know.  
7 **Q. But at a more general level, the**  
8 **discussion is going on before the bankruptcy is**  
9 **a global combination and the discussion going on**  
10 **after the bankruptcy is North American**  
11 **operations only, correct?**  
12 A. On a global basis, before the  
13 bankruptcy, it was a merger and an acquisition  
14 of the holding company.  
15 **Q. Okay.**  
16 A. And after the bankruptcy, and that  
17 might have taken many complicated forms,  
18 depending on what assistance was going to be  
19 provided by the federal government or the rest  
20 of Wall Street, so it's hard to say this is what  
21 the structure would have been before. But  
22 afterwards, it was a discussion about  
23 principally about buying U.S. investment banking  
24 and capital markets businesses.  
25 **Q. In the period before the bankruptcy,**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 bankrupt entity and how we would deal with the  
3 employee issue.  
4 **Q. Okay. Did you have discussions with**  
5 **Anthony about which employees would transfer**  
6 **from Lehman to Barclays as part of the**  
7 **post-bankruptcy transaction?**  
8 A. I don't know if the discussions were  
9 with Anthony. As I mentioned earlier, I had  
10 discussions with HR, could have been Ros Coffey,  
11 who was our HR representative, I don't know,  
12 about which employees from Legal, Compliance and  
13 Audit would transfer over, but did not have a  
14 conversation about transfer of employees  
15 generally, other than, again, throughout this  
16 week there were specific discussions around  
17 things like Eagle Energy, the Israeli office,  
18 Canada.  
19 **Q. Right.**  
20 A. Kind of one-off discussions. And  
21 those discussions did not, in my recollection,  
22 include the issue of accrued bonus or comp.  
23 **Q. The reason I'm showing you this**  
24 **document and maybe a couple others that I will**  
25 **show you is to see if it refreshes your view,**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **when the more worldwide, the global discussions**  
3 **were on the table, was there, to your knowledge,**  
4 **any calculation of what the global bonus accrual**  
5 **might be?**  
6 A. Not that I know of.  
7 **Q. To your knowledge, is the schedule**  
8 **that's attached to this exhibit a calculation of**  
9 **what the global bonus liability was for LBI and**  
10 **put to the 2,163,000,000?**  
11 A. Repeat the question. I'm sorry.  
12 **Q. The 2,163,000,000 number that we**  
13 **focused on before for LBI, is that a, to your**  
14 **knowledge, is that a calculation of the global**  
15 **accrual, the accrual for employees around the**  
16 **world, not just North America?**  
17 A. I have no knowledge of what that  
18 number is.  
19 **Q. Do you have any recollection of any**  
20 **conversations with Mr. Collerton about this**  
21 **potential retention and severance estimates**  
22 **spreadsheet that he sent to you on September 15?**  
23 A. I don't specifically recall the  
24 conversation. I do recall having conversations  
25 with Anthony about how we would manage as a  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **your recollection about whether any of the work**  
3 **you did played a role in the calculation of that**  
4 **\$2 billion comp number we saw on the September**  
5 **16 financial schedule that you signed.**  
6 A. To my knowledge, it did not.  
7 (Exhibit 42, a document bearing Bates  
8 Nos. 10283125 with attachment, marked for  
9 identification, as of this date.)  
10 **Q. Now, I have put before you, Mr.**  
11 **Berkenfeld, a document marked Exhibit 42, an**  
12 **e-mail from Eric Umlauf to Steven Berkenfeld and**  
13 **others at Lehman entitled "LB Cash Flow**  
14 **Forecast\_150908.xls - for our discussion," and**  
15 **there's an attachment, which is also reproduced**  
16 **here.**  
17 **Have you seen this document before?**  
18 A. I don't specifically recall it.  
19 **Q. Do you have a general recollection of**  
20 **seeing it?**  
21 A. General recollection I think I do  
22 have.  
23 **Q. And what's your general recollection**  
24 **of the circumstances under which you were sent**  
25 **this document and why it was sent to you?**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. I think that this document, again, was  
3 to help us calculate what cash we were going to  
4 have available to continue to operate in  
5 bankruptcy.  
6 Q. When Mr. Umlauf refers to "for our  
7 discussion" in the subject, does that trigger  
8 your recollection as to whether there was a  
9 discussion with him or others in which you were  
10 involved about the spreadsheet?  
11 A. No, it doesn't trigger a special  
12 recollection.  
13 Q. Could you take a look at the  
14 spreadsheet, if you would, and the first page of  
15 it, in particular. Now, down under -- in line  
16 number 12, where it says Payroll, September  
17 2008, local employees only, and you have got a  
18 \$4,267,000 number there. You with me?  
19 A. Which number?  
20 Q. 12.  
21 A. A 12, yes.  
22 Q. Now, is that the type of thing you  
23 were talking about, what's my payroll for the  
24 next couple of weeks while we get this,  
25 quote/unquote, orderly wind-down done?  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 that.  
3 (Exhibit 43, a document bearing Bates  
4 Nos. 10270558, marked for identification, as  
5 of this date.)  
6 Q. Marked as Exhibit 43, Mr. Berkenfeld,  
7 is an e-mail from you to Tracy Binkley. It's a  
8 one-page document bearing document number  
9 10270558, and it reflects an e-mail exchange  
10 starting with an e-mail from Ms. Binkley to you  
11 and your response to her. Would you read  
12 through that, please?  
13 A. You want me to read -- what do you  
14 want me to read?  
15 Q. Just read it enough to tell me whether  
16 you remember seeing the document.  
17 A. Yes. I have.  
18 Q. You do remember seeing it?  
19 A. Do I remember this document? No, I  
20 don't have a specific recollection of this  
21 document.  
22 Q. In the bottom e-mail, Ms. Binkley  
23 writes to you on the night of -- at about 11  
24 minutes after 5 P.M. on September 18, an e-mail  
25 entitled "A schedule referred to in the Purchase  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. Generally, yes. I don't remember  
3 discussion on things like travel and  
4 entertainment and whatnot. So I don't remember  
5 any specific conversation on this. Just looking  
6 at these items, some of it just doesn't make  
7 sense to me, so I don't recall discussion  
8 actually working through these items. I'm not  
9 sure who we were entertaining then.  
10 Q. Who you were, I'm sorry?  
11 A. Who we were entertaining then.  
12 Q. Other than the world at large,  
13 perhaps, but I take it the golf stuff had all  
14 stopped and the --  
15 A. Yes. So I don't know what we ever did  
16 with this and what the conclusion that came from  
17 it, and I don't recall specific discussions  
18 among this group about it.  
19 Q. So I take it you're not the guy I  
20 should ask about why Charles Tyrwhitt  
21 Shirtmakers are on the list of contracts?  
22 A. Were they listed as a -- what's the  
23 expression here? Critical unpaid vendor or  
24 non-critical?  
25 Q. That I don't know. I'm done with  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 Agreement," and she writes, "The HR director at  
3 Barclays called to try to get a schedule that  
4 was supposed to be initialed by the parties and  
5 is a financial schedule related to bonuses  
6 (accrued '09 FY liability). It sounds like his  
7 team is concerned about getting that document  
8 before closing. Do you know what he's referring  
9 to and where to get his hands on it?" And then  
10 you respond to Ms. Binkley, "I don't. Check  
11 with Bart and Skip."  
12 Do you recall her asking you for a  
13 copy of the 9/16/08 financial schedule?  
14 A. I don't specifically recall.  
15 Q. Do you recall the financial schedule  
16 going missing for a while and a lot of people  
17 asking for it?  
18 A. No.  
19 Q. Why, as best you can tell, would you  
20 have told Ms. Binkley to check with Bart and  
21 Skip?  
22 A. I think that I would probably  
23 characterize this as a misunderstanding or  
24 miscommunication.  
25 Q. Okay.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. Coming from Tracy Binkley, who was one  
3 of the co-heads of HR, I don't know -- I don't  
4 remember exactly whether Anthony reported to her  
5 or vice-versa, but they were the two senior  
6 people in human resources, so she was looking  
7 for a financial schedule related to bonuses.  
8 I didn't consider that schedule, the  
9 exhibit that we were referring to before,  
10 remember, Exhibit 19, I would never have  
11 described that as a financial schedule related  
12 to bonuses. To me that sounded like an actual  
13 human resource produced document about what  
14 bonuses were going to be paid out to who.  
15 **Q. Uh-huh.**  
16 A. So I thought she was asking for  
17 actually a schedule of bonuses as opposed to a  
18 financial schedule related to bonuses because  
19 there would be no reason for her to have that  
20 whole schedule just for that one item or for the  
21 director, HR director at Barclays, to need that  
22 whole schedule of assets and liabilities to know  
23 what the, quote/unquote, accrued '08 FY  
24 liability was.  
25 So I thought she was asking for some  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 before.  
3 A. I don't specifically recall this  
4 document.  
5 **Q. Do you have a general recollection of**  
6 **it?**  
7 A. Not of this document, no.  
8 **Q. Can you tell me who Bridget O'Connor**  
9 **is?**  
10 A. Bridget O'Connor was the head of  
11 technology at Lehman.  
12 **Q. And in this e-mail Ms. Rudofker writes**  
13 **to you, "Here's what I think we are around --**  
14 **here's where I think we are around big issues,"**  
15 **and then lists three of them with some**  
16 **subheadings, right? The first one, complete**  
17 **purchase agreement, refers to a Barclays**  
18 **assessment of mortgage TBA risk in a DTC box, et**  
19 **cetera, et cetera.**  
20 **Do you have any idea what that's**  
21 **referring to?**  
22 A. I do not.  
23 **Q. At all?**  
24 A. At all.  
25 **Q. The second with regard to "Day 1**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 sort of actual schedule of bonuses that might  
3 have been part of this discussion between the  
4 business people about how you were going to  
5 compensate and retain employees, and that was  
6 not anything that I was aware of.  
7 **Q. Okay. You didn't understand that to**  
8 **mean the one-sheet financial schedule we were**  
9 **talking about before?**  
10 A. It wouldn't have made sense to me that  
11 Tracy would be asking for that schedule just for  
12 that information. It seemed, again, within the  
13 context of knowing Tracy, I read it to  
14 understand that she was looking for actually  
15 some sort of schedule of bonuses.  
16 (Exhibit 44, a document bearing Bates  
17 Nos. 459686, marked for identification, as  
18 of this date.)  
19 **Q. You have before you what we've marked**  
20 **as Exhibit 44, a one-page document bearing**  
21 **number 459686, an e-mail from Beth Rudofker to**  
22 **you, Ian Lowitt, Alastair Blackwell, Bridget**  
23 **O'Connor, with a copy to Bart McDade.**  
24 **Take a look through it and tell me**  
25 **whether you remember seeing this document**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **business," the second item below there says,**  
3 **"Resolve 15c3 lockup. Meetings happening now."**  
4 **Do you see that?**  
5 A. Uh-huh.  
6 **Q. Do you know what --**  
7 A. Yes, I do.  
8 **Q. -- that's a reference to?**  
9 A. To the 15c3 issue mentioned before,  
10 but I don't have any specifics around what the  
11 issue was.  
12 **Q. Does this refresh your recollection as**  
13 **to what the 15c3 issue was?**  
14 A. No, it does not.  
15 **Q. As you sit here today, do you have any**  
16 **idea, any clue what the 15c3 issue was?**  
17 A. No, I do not.  
18 (Exhibit 45, a one-page e-mail from  
19 Ian Lowitt to Steven Berkenfeld, Bart  
20 McDade, Alex Kirk, Paolo Tonucci, CC to  
21 James Seery, dated 9/22/08 at 7:23 A.M.  
22 entitled "Looks Like We're All Set," marked  
23 for identification, as of this date.)  
24 **Q. Mr. Berkenfeld, Exhibit 45, which is**  
25 **before you, is a one-page e-mail from Ian Lowitt**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 to Steven Berkenfeld, Bart McDade, Alex Kirk,  
3 Paolo Tonucci, CC to James Seery, dated 9/22/08  
4 at 7:23 A.M. entitled "Looks Like We're All  
5 Set."

6 Do you recall this e-mail?

7 A. I do.

8 Q. Okay. There's two e-mails in there.  
9 There's the one from you to McDade, Lowitt, et  
10 al., to which Mr. Lowitt responds, "Hooray!!!  
11 Ian." It's the original one I want to ask you  
12 about: "JPMorgan blinked. They agreed to  
13 cancel the \$7.4 billion collateral purchase. We  
14 are starting the closing."

15 What did you mean when you wrote  
16 "JPMorgan blinked"?

17 A. A few things about this. One, if Bart  
18 and Ian were no longer at Weil, which this  
19 implied, I'm e-mailing it to them, they had gone  
20 home, might have again meant I was the only one  
21 available to sign anything when the closing came  
22 around, if the clarification was signed at  
23 Monday morning. I don't remember when it was,  
24 but one more reason why I would have been forced  
25 to sign it.

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 I have also mentioned before that  
3 there was this negotiation going on away from us  
4 between JPMorgan and Barclays that Lehman was  
5 not a part of and we were wondering whether it  
6 was going to disrupt the transaction and prevent  
7 the closing.

8 At 7:19 in the morning, or  
9 thereabouts, we finally had a resolution between  
10 JPMorgan and Barclays on that issue. The  
11 details of it I don't remember much more than  
12 what this says, I just don't have a  
13 recollection, but it was to tell them what was  
14 holding up the closing, which was the dispute  
15 with JPMorgan, there had been a concession,  
16 there had been an agreement, and we're starting  
17 the closing process.

18 Q. Your e-mail refers to JPMorgan saying,  
19 "They agreed to cancel the \$7.4 billion  
20 collateral purchase." Do you know anything more  
21 about what the JPMorgan issue was than it  
22 involved \$7.4 billion collateral purchase?

23 A. Sorry. I don't recall at this point.

24 Q. Any recollection at all of a \$7.4  
25 billion issue holding up your closing?

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 A. I remember that the collateral issue  
3 between JPMorgan and Barclays was holding up the  
4 closing, but we were kept out of the discussion,  
5 so I didn't know much about the details then and  
6 I don't recall much more about it now.

7 Q. When you learned that it had been  
8 resolved, did you learn any information other  
9 than it was resolved?

10 A. Not that I recall.

11 Q. Did you learn any details of any  
12 agreement between Barclays and JPMorgan?

13 A. No, I don't believe that I have.

14 Q. Even if as you sit here now yet you  
15 don't have a firm recollection of what it was,  
16 do you remember if you did have a firm  
17 recollection, you know, a better, a more  
18 detailed grasp of what the issue was at the  
19 time?

20 A. I'm confident I had a better  
21 recollection of the issue at the time.

22 Q. Uh-huh.

23 A. Had been around there in a lot of dead  
24 time all night and had been an observer of some  
25 bigger conference calls that had happened, but I

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 couldn't provide any more insight at this point,  
3 and there were many people who were much, much  
4 closer to the issues than I was who could give  
5 you more.

6 (Exhibit 46, a document bearing Bates

7 Nos. BCI-CG00034704 through 34707, marked  
8 for identification, as of this date.)

9 Q. I've given you, Mr. Berkenfeld, what  
10 we have marked as Exhibit 46, a document bearing  
11 Bates Nos. BCI-CG00034704 through 707, which on  
12 its first page reflects an e-mail from Harvey  
13 Miller at Weil.com to Lindsee Grandfield at  
14 CGSH.com, entitled "Barclays/Lehman (JPMorgan)," and below that you'll see an e-mail from Lindsee  
15 Grandfield to Harvey Miller, copy to Bart  
16 McDade, Joanne Pflaum, Lori Fife, Michael  
17 Lubowitz, Richard Krasnow, Rod Miller,  
18 sberkenfeld@lehman.com, and some others.

20 Would you take a look through that  
21 e-mail, Mr. Berkenfeld, and tell me if it  
22 refreshes your recollection about what the  
23 nature of the issue was with JPMorgan in light  
24 of an e-mail, you know, in light of the e-mail  
25 that Cleary Gottlieb is spending to you and

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **others about the issue?**  
3 A. Okay.  
4 **Q. Does that refresh your recollection**  
5 **about what the JPMorgan issue may have been?**  
6 A. Somewhat.  
7 **Q. Okay. How does it refresh your**  
8 **recollection?**  
9 A. I just remember more that some of the  
10 impediment to the original transaction that we  
11 had come up with and we agreed to in the Asset  
12 Purchase Agreement was perhaps best put more  
13 conceptual than practical and that we didn't  
14 really have a time to figure out how it was  
15 going to work to transfer all these assets and  
16 liabilities and how the clearing bank's role  
17 would be affected and what -- if it had liens on  
18 the assets and all the complications around  
19 JPMorgan being our clearing agent for our  
20 securities transactions.  
21 **Q. Did Lehman have to make any concession**  
22 **or change with respect to what it was giving**  
23 **Barclays as a result of the JPMorgan piece that**  
24 **we're talking about now?**  
25 A. I don't know.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **you want to focus his attention?**  
3 MR. GAFFEY: Yeah, the e-mail. I  
4 don't need to go into the -- most of that  
5 exhibit is the --  
6 MR. STERN: The e-mails start on --  
7 MR. GAFFEY: -- attachment.  
8 The e-mails start at 35137, Jack.  
9 That's the last page.  
10 **Q. Mr. Berkenfeld, we've marked as**  
11 **Exhibit 47 a quite large document bearing Bates**  
12 **Nos. BCI-CG00035134 through 35955, and it**  
13 **consists of an e-mail of a couple of pages and**  
14 **then a large set of -- a large spreadsheet**  
15 **that's attached to it.**  
16 **Do you recall receiving this e-mail**  
17 **entitled "Delivering other assets to Barclays,"**  
18 **which is the name of each of the e-mails in the**  
19 **chain?**  
20 A. Right, I don't specifically recall  
21 this e-mail, no.  
22 **Q. These e-mails all are dated on**  
23 **Saturday the 20th, with the earliest of them**  
24 **being 20 September 2008 at 11:29.**  
25 MR. STERN: No. No. No. Wait.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Q. Have any recollection of Lehman having**  
3 **to agree to give 7 billion in cash to Barclays?**  
4 MR. STERN: I'll object to the form.  
5 A. Between bankruptcy and the closing?  
6 **Q. Yes.**  
7 A. I don't recall whether we had to give  
8 additional cash to JPMorgan during that time  
9 period.  
10 **Q. Not JPMorgan. To Barclays.**  
11 A. I think you asked JPMorgan.  
12 **Q. Then I got it wrong. That's okay.**  
13 **I'll give you a new question and we'll have a**  
14 **question and answer on the transcript.**  
15 **Do you recall if Lehman agreed to give**  
16 **Barclays 7 billion in cash?**  
17 MR. STERN: Objection to the form.  
18 A. I don't recall and I would -- wasn't  
19 part of the direct participation in these  
20 negotiations.  
21 (Exhibit 47, a document bearing Bates  
22 Nos. BCI-CG00035134 through 35955, marked  
23 for identification, as of this date.)  
24 MR. STERN: Given the size of this  
25 exhibit, are there any particular sections  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 MR. GAFFEY: Yeah.  
3 MR. STERN: 11:22.  
4 MR. GAFFEY: I beg your pardon.  
5 You're right.  
6 **Q. The earliest is from Paolo Tonucci to**  
7 **Rod Miller, Azerad, et cetera, et cetera, and**  
8 **ultimately this winds up being forwarded to the**  
9 **V. Lewkow at Cleary.**  
10 **Do you recall generally on the**  
11 **Saturday, the 20th, an issue about delivering**  
12 **other assets to Barclays?**  
13 A. I recall generally an issue of we've  
14 got some mechanical issues to deal with on some  
15 of this stuff --  
16 **Q. Okay.**  
17 A. -- and we've got to figure out how to  
18 do that. And that was something that, as we  
19 worked through our verticals, was going to be in  
20 the hands of finance working with Rod Miller.  
21 And I actually do recall arranging to have Rod  
22 Miller, a lawyer at Weil Gotshal, at the request  
23 of finance guys, being kind of a dedicated  
24 lawyer for these sort of issues with Finance.  
25 **Q. And by "Finance," you mean Paolo**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Tonucci?**  
3 A. I mean everyone on this list, Robert  
4 Azerad and Lowitt, Dan Fleming. They were all  
5 members of the Finance Division. So I do recall  
6 them saying we have these mechanical issues,  
7 it's complicated, we need help, who can we rely  
8 on, and arranging to have Rod Miller be their  
9 point person.  
10 **Q. Did your understanding at the time go**  
11 **any deeper than there were mechanical issues?**  
12 **Did you know the nature of the issues?**  
13 A. Very superficially.  
14 **Q. Now, within the chain of e-mails, and**  
15 **I guess I'm on page BCI35135, there's an e-mail**  
16 **from Miller to Tonucci, copy Azerad, Fleming,**  
17 **Berkenfeld, subject, "Delivering other assets to**  
18 **Barclays," and it says, "We still have the 50**  
19 **percent of residential to transfer at closing,**  
20 **right? Those were not thrown into the repo,**  
21 **right?" Do you see that?**  
22 A. Yes.  
23 **Q. Any clue what that means?**  
24 A. No.  
25 **Q. At all?**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 (Recess; Time Noted: 3:23 P.M.)  
3 (Time Noted: 3:30 P.M.)  
4 MR. GAFFEY: I have no further  
5 question.)  
6 EXAMINATION BY  
7 MR. OXFORD:  
8 **Q. Mr. Berkenfeld, we met off the record**  
9 **earlier. My name is Neil Oxford. I'm with**  
10 **Hughes, Hubbard & Reed and we represent the SIPA**  
11 **Trustee.**  
12 **As Mr. Gaffey said, he's given you the**  
13 **gift of time and he's asked a lot of questions**  
14 **that I was going to ask, so I will try and not**  
15 **ask any of the questions he's already asked, but**  
16 **apologize in advance if I do retread some**  
17 **ground.**  
18 MR. STERN: He did use the term  
19 "gift." It doesn't really feel like a gift,  
20 but go ahead.  
21 MR. OXFORD: Perhaps not --  
22 A. I wasn't sure what he was referring to  
23 when he said that.  
24 **Q. Perhaps not when he gives it to me,**  
25 **it's not.**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. Well, I had a clue that we're talking  
3 about the resis that were -- excuse me.  
4 MR. STERN: Objection to form. The  
5 question is whether he has any clue? Object  
6 to the form.  
7 A. Do I have any clue?  
8 **Q. Any idea of what that means?**  
9 A. I have no idea. Clue just might be  
10 that it refers to the resi provisions that had  
11 been in the Asset Purchase Agreement and it was  
12 the issue of transferring 50 percent of the  
13 resis.  
14 **Q. Now, that 50 percent resi provision in**  
15 **the Asset Purchase Agreement came out in the**  
16 **clarification letter, do you recall that?**  
17 A. I do recall that.  
18 **Q. Okay. So would you have known the**  
19 **answer to this question, "Do we still have the**  
20 **50 percent of residential to transfer at**  
21 **closing?"**  
22 A. At that point in time I would not have  
23 known the answer to that.  
24 MR. GAFFEY: Let's take a five-minute  
25 break.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Mr. Berkenfeld, you said that you did**  
3 **not recall hearing about any changes in the**  
4 **terms of the deal between the signing of the APA**  
5 **on the 16th and the 19th of September until such**  
6 **time as you got into court?**  
7 MR. STERN: Objection to the form.  
8 **Q. Is that a fair statement of your**  
9 **testimony?**  
10 MR. STERN: Objection to the form.  
11 A. I think it would be fair to say that I  
12 wasn't aware of significant financial changes to  
13 the deal. I knew and, as I testified, that  
14 there were discussions going on around what  
15 businesses would be included and some of the  
16 other non-financial elements, but I didn't know  
17 about specific changes to the financial deal, I  
18 think, until court. But I don't recall. I  
19 don't recall knowing about it beforehand.  
20 **Q. Okay. Tell me what you recall**  
21 **learning in court that day on the 19th.**  
22 MR. STERN: Objection to the form.  
23 **Q. My question is specifically with**  
24 **respect to the financial changes to the deal as**  
25 **reflected in the APA?**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. I think I principally learned about  
3 the size of the bucket of assets and liabilities  
4 that were being transferred over.

5 **Q. What --**

6 A. The amount of them.

7 **Q. What did you learn about the size of**  
8 **the bucket?**

9 A. That it had been -- the overall  
10 quantum had changed from the 72 billion or so to  
11 the 42 billion or so.

12 **Q. Did you understand that the balance**  
13 **between assets purchased and liabilities assumed**  
14 **were still roughly equal as it was under the**  
15 **APA?**

16 MR. STERN: Objection to the form.

17 A. I understood that there was rough  
18 equivalency in the amounts of assets and  
19 liabilities. Not between the signing and what  
20 happened at the hearing, but between the assets  
21 and the liabilities.

22 **Q. Do you remember which lawyers were in**  
23 **court making those disclosures?**

24 A. I recall Harvey Miller and Lori Fife  
25 presenting to the court.

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Q. Do you recall anybody else presenting**  
3 **to the court?**

4 A. I vaguely recall that there was  
5 another Weil Gotshal lawyer presenting to the  
6 court. I don't remember which one. Might have  
7 been Shai. I may have that wrong.

8 There were certainly presentations to  
9 the court by a number of lawyers, Mr. Novikoff,  
10 he presented to the court. There was lawyers  
11 Creditors Committee. There was lawyers for  
12 SIPAC. I believe there might have been lawyers  
13 for Hughes Hubbard. I don't recall all of them,  
14 but there was a lengthy proceeding.

15 **Q. Do you recall at some point that there**  
16 **was a break in proceedings and Judge Peck went**  
17 **off the record to allow the terms of the deal to**  
18 **be explained to the gallery?**

19 A. I don't recall Judge Peck going off  
20 the record and him being present.

21 **Q. Do you remember him going off the**  
22 **bench?**

23 A. I recall him leaving the bench at some  
24 point and I do recall some meeting between the  
25 Weil Gotshal lawyers, and I don't know who else

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 was involved, but representatives of the  
3 creditors.

4 **Q. Were you present for that meeting?**

5 A. I was not.

6 **Q. What were you doing at this time?**

7 A. I was in the courtroom or in the  
8 hallways.

9 **Q. Who else from Lehman was present in**  
10 **court? And I'm not talking about outside**  
11 **counsel at the moment. I'm talking about the**  
12 **business people.**

13 A. I will tell you Hillary Clinton -- not  
14 Hillary, Chelsea Clinton was there.

15 From Lehman, Bart McDade, Jim Seery,  
16 Mark Shapiro. Mike Konigsberg was there. J.F.  
17 Astier was there. Kevin Genirs was there. The  
18 last three in more of just an observer role.

19 Who else was there? I don't recall  
20 anyone else specifically.

21 **Q. What role was Mr. McDade there in?**

22 A. Bart was there as a representative of  
23 Lehman Brothers and his testimony was being  
24 proffered to the court.

25 **Q. What about Mr. Seery, what role was he**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **there fulfilling?**

3 A. I'm not sure Jim was there in any  
4 formal capacity.

5 **Q. Same question for Mr. Shapiro?**

6 A. I don't think Mark was there in any  
7 formal capacity either. I think that both of  
8 them and myself had been involved in various  
9 aspects of the transaction, and frankly, that's  
10 where the action was that day and we felt that  
11 we wanted to witness it and thought we should be  
12 there in case it was necessary for us to be  
13 there.

14 **Q. On the Barclays side, do you recall**  
15 **who was in court for Barclays?**

16 A. Barclays' counsel was there from  
17 Cleary, and I recall that Archie Cox and Michael  
18 Klein were in the courtroom. I don't have a  
19 recollection of anyone else from Barclays being  
20 there.

21 **Q. And where physically in the courtroom**  
22 **were you? Were you in Judge Peck's courtroom?**

23 A. Yes.

24 **Q. Because I understand there was a**  
25 **number of overflow rooms.**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. Yes, it was a pretty packed  
3 courthouse, but I actually went down --  
4 I remember somebody else from Lehman  
5 who was there. Chris O'Meara.  
6 -- went down to the courthouse by  
7 subway with Chris O'Meara and Brian Marsal from  
8 A&M, and I can't remember how, but somehow we  
9 were able to get into the courtroom. Somebody  
10 there kind of reserved a spot for us or so,  
11 because it was already pretty full.  
12 And if you know the courtroom, if  
13 you're looking at the bench, there's a -- some  
14 seats all the way on the right-hand side against  
15 the wall, and we were sitting/standing/leaning  
16 over there by the windows.  
17 **Q. And were you sitting/standing beside**  
18 **the Lehman people or the Barclays people or**  
19 **both?**  
20 A. It was just everybody was standing  
21 next to everyone. There were not sections.  
22 Actually, I think it was pretty close to the  
23 Trustee.  
24 **Q. At any point during the court hearing**  
25 **did you recall a discussion about additional**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 security positions, additional security  
3 positions being transferred, I don't recall  
4 that.  
5 **Q. Do you recall any discussion about the**  
6 **value of the deal to Barclays having fallen and**  
7 **that additional assets of any type being**  
8 **transferred to them to compensate them for that?**  
9 A. I don't recall that.  
10 **Q. Fair to say you don't recall any**  
11 **discussion of assets in Barclays' clearings box**  
12 **being transferred -- I'm sorry, Lehman's**  
13 **clearings box being transferred to Barclays?**  
14 A. My answer again is I don't recall.  
15 **Q. Do you recall any discussion about the**  
16 **transfer of any margin at the options clearing**  
17 **corporation?**  
18 A. I don't --  
19 I'm sorry.  
20 **Q. Or any other exchange being**  
21 **transferred to Barclays?**  
22 A. I don't recall discussion of that.  
23 Again, I don't know whether it was. I just  
24 don't recall it.  
25 MR. OXFORD: Could I have what has  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **assets being transferred to Barclays from**  
3 **Lehman?**  
4 A. Somewhat, yes.  
5 **Q. Tell me what you recall about that,**  
6 **please.**  
7 A. I recall, and some of this is  
8 recollection that might have been refreshed from  
9 reading sections of the transcripts in  
10 preparation for deposition, but I recall  
11 discussions around some of the, for instance,  
12 the subsidiaries that were going, Uruguay and  
13 Canada, the IMD business being transferred over.  
14 So maybe I should have drawn a  
15 distinction between the question on assets and  
16 what I recall, which is more around businesses.  
17 **Q. Just so I understand your answer, do**  
18 **you have any recollection of a discussion in**  
19 **court about the transfer of additional assets to**  
20 **Barclays?**  
21 A. Could you clarify what you mean  
22 "assets"? Do you mean businesses or do you mean  
23 securities positions?  
24 **Q. Securities positions.**  
25 A. I don't recall a discussion of  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 been previously marked as Exhibit 11,  
3 please.  
4 (Document placed before the witness.)  
5 **Q. You have in front of you, Mr.**  
6 **Berkenfeld, what's previously been marked as**  
7 **Exhibit 11. It's an e-mail from Peter**  
8 **Schellbach to Daniel Kamensky and a number of**  
9 **others at Lehman, and the top e-mail is sent on**  
10 **Saturday, September 20, 12:37 GMT. The e-mail**  
11 **below is an e-mail sent from Daniel Kamensky on**  
12 **September 19 at 6:37 P.M. to Eric Felder and**  
13 **others.**  
14 **Do you recall seeing this e-mail**  
15 **before?**  
16 A. No, I have not seen this e-mail  
17 before. Let me read it.  
18 (Document review.)  
19 A. Okay.  
20 **Q. Mr. Kamensky did not appear to check**  
21 **his BlackBerry like you did when he got to**  
22 **court?**  
23 A. I found that some of the people who  
24 are used to going to bankruptcy court knew that  
25 you could get around the rules.  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **Q. Mr. Kamensky says in the third**  
3 **paragraph, "Weil lawyers a bit out of whack, but**  
4 **granted timing here not unexpected. They didn't**  
5 **explain the balance sheet change as well, but**  
6 **then a Barclays lawyer came in and gave a much**  
7 **better explanation."**

8 **Does that refresh your recollection**  
9 **about any of the disclosures that were made by**  
10 **either of the Weil lawyers or the Barclays**  
11 **lawyers about the balance sheet changes to the**  
12 **deal?**

13 A. It does not.

14 **Q. Mr. Berkenfeld, you said in response**  
15 **to one of Mr. Gaffey's questions that one of the**  
16 **changes you did remember in the deal between the**  
17 **signing of the APA on September 16th and the**  
18 **19th was that there would be no cash going to**  
19 **Barclays, do you remember that?**

20 A. Yes.

21 **Q. How is it that you came to understand**  
22 **that that was a change to the business terms of**  
23 **the deal?**

24 A. I should answer the reason I  
25 remembered that was reading through the

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 transcript in preparation for depositions, that  
3 that had changed between signing and the  
4 hearing. I don't know that I would have had  
5 independently remembered whether cash had been  
6 pulled out or not.

7 **Q. Do you remember discussing that change**  
8 **to the deal with anybody?**

9 A. I don't recall.

10 **Q. You don't remember having any**  
11 **discussions about the existence of cash in the**  
12 **deal from the date of the bankruptcy hearing**  
13 **through the signing of the clarification letter?**

14 A. My recollection from, again, reading  
15 the transcript was that the cash that was  
16 included in the Asset Purchase Agreement as one  
17 of the purchased assets was pulled out and that  
18 was reflected in the clarification letter, and I  
19 believe it's disclosed in the transcript to the  
20 court. I don't remember any change in that  
21 between the hearing and the signing of the  
22 clarification letter.

23 (Exhibit 48, an e-mail from Monty  
24 Forrest to Alastair Blackwell and others,  
25 marked for identification, as of this date.)  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **Q. Can you let me know when you've had a**  
3 **chance to read that?**

4 (Document review.)

5 A. Okay.

6 **Q. Mr. Berkenfeld, you have in front of**  
7 **you what I have marked as Exhibit 48, which is**  
8 **an e-mail from Monty Forrest to Alastair**  
9 **Blackwell and others. You're not on the final**  
10 **chain, but you do appear in the original couple**  
11 **of entries in the chain, and it's those that I**  
12 **would like to ask you about.**

13 **For the record, I'll identify this as**  
14 **being sent from Mr. Forrest on Sunday, 21st, and**  
15 **says 1:38 A.M., but that's a GMT time, I'll**  
16 **represent for the record, so it's 9:38 P.M. on**  
17 **Saturday, the 20th.**

18 **If you go to the end of the chain,**  
19 **that's what I would like to ask you about.**

20 A. Yes.

21 **Q. Do you see that Mr. Lowitt sent you an**  
22 **e-mail September 20 at 5:53 A.M. and he sends it**  
23 **to you and to Mr. McDade, copying Mr. Tonucci.**  
24 **See that?**

25 A. Yes.

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **Q. And it says, "Did the court accept the**  
3 **lockup -- the 15c3 lockup and unencumbered box**  
4 **make it through the BarCap?"**

5 **Do you know what that question means,**  
6 **Mr. Berkenfeld?**

7 A. Not really. I mean vaguely, but no  
8 more so than you would.

9 **Q. Tell me what it means to you.**

10 A. What it means to me is -- well, not  
11 much. About transfer of assets over -- which  
12 assets could be transferred over to Barclays,  
13 but I don't understand the details of it and  
14 specifically what Ian was asking.

15 **Q. Do you know why Mr. Lowitt was asking**  
16 **you?**

17 A. He was asking me and Bart, I believe,  
18 because we were at the hearing. I mean, I'm  
19 assuming 5:53 A.M. is 12 A.M., 1 A.M.

20 **Q. Actually, these are in Eastern**  
21 **Standard Time. It's only the last --**

22 A. Okay. So it would have been early in  
23 the morning after the hearing. So he was  
24 looking for a report on whether this had been  
25 specifically addressed and resolved by the

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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       court, and I don't recall whether it happened.  
3       **Q. Okay. So you don't know the answer to**  
4       **this question sitting here today?**  
5       A. No, I delegated it to, at least the  
6       second part of it about getting the lawyers  
7       working on getting it done, to Beth Rudofker.  
8       **Q. Do you know why Mr. Lowitt wanted to**  
9       **make sure that the documentation was very tight?**  
10      A. No, I do not.  
11      **Q. Did you have any conversations with**  
12      **Mr. Lowitt about his e-mail?**  
13      A. No, not that I recall.  
14      **Q. Did you have any conversations with**  
15      **Mr. McDade about his e-mail?**  
16      A. No, I did not.  
17      **Q. You'll see two chains up Beth Rudofker**  
18      **sends an e-mail to you, Saturday, September 20,**  
19      **at 6:11 P.M., do you see that?**  
20      A. Yes.  
21      **Q. It says, "Alastair and Neil are**  
22      **working on getting it ringfenced/moved if**  
23      **needed." Is that Alastair -- is "Alastair"**  
24      **Alastair Blackwell?**  
25      A. I would presume so since he is CC'd  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       **the APA that you signed on the 16th transfer**  
3       **that margin to Barclays?**  
4       A. I don't really have knowledge on that.  
5       I'd have to go back and do the same analysis. I  
6       don't have any recollection. It just would be  
7       my reading of the contract.  
8       **Q. And what is your reading of the**  
9       **contract, if you have one, on that question of**  
10      **whether or not --**  
11      A. I don't have one.  
12      **Q. If I were to put the APA and the**  
13      **definition of "purchased assets" in front of**  
14      **you, would you be able to give me a reading?**  
15      A. I don't know.  
16      MR. STERN: Neil, I just ask the  
17      source of Exhibit 48.  
18      MR. OXFORD: Whose file it came from?  
19      MR. STERN: Well, as in who produced  
20      it.  
21      MR. OXFORD: I don't believe it's been  
22      produced.  
23      MR. STERN: What's the source? Is  
24      this from Lehman's files?  
25      MR. OXFORD: I think it's from an Iron  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       above.  
3       **Q. Okay. Who is Neil?**  
4       A. I would assume that Neil is Neil  
5       Ullman who is CC'd above.  
6       **Q. Do you know why they were working on**  
7       **getting it ringfenced or moved?**  
8       A. I do not.  
9       **Q. Beth Rudofker says she's working on --**  
10      **withdrawn -- that Mr. Blackwell and Mr. Ullman**  
11      **are working on getting it ringfenced/moved, if**  
12      **needed, you see that?**  
13      A. Yes.  
14      **Q. Does that suggest to you that there's**  
15      **some uncertainty as to whether or not these**  
16      **assets will be moved to BarCap?**  
17      A. It doesn't suggest anything to me in  
18      particular.  
19      **Q. Turning again to the OCC margin just**  
20      **briefly, do you recall any discussion with**  
21      **anyone at any time about the inclusion of margin**  
22      **at the OCC or any other exchanges in the**  
23      **transaction with Barclays?**  
24      A. I don't recall.  
25      **Q. To the best of your knowledge, does**  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       Mountain file.  
3       MR. STERN: Well, I just want to point  
4       out that you have marked a Lehman document  
5       that arguably contains communications that  
6       would be considered attorney work product  
7       and potentially attorney-client  
8       communications, and I'll state again our  
9       position that, to the extent that either LBI  
10      or LBHI asks about or discloses partially  
11      such communications, it's our position that  
12      constitutes a subject matter waiver.  
13      MR. OXFORD: Your position is noted,  
14      Jack. I don't agree that we have waived  
15      anything by showing this document to this  
16      witness, but we can address the matter if it  
17      becomes an issue later on.  
18      MR. GAFFEY: I should say Lehman  
19      Brothers Holdings, Inc. does not waive any  
20      privilege.  
21      MR. STERN: Well, Lehman Brothers  
22      Holdings may have through your questions.  
23      That's not something we can resolve sitting  
24      here today, but I just want to state our  
25      position on the record.  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       (Exhibit 49, a document bearing Bates  
3       Nos. BCI-CG00024954 through 24972, marked  
4       for identification, as of this date.)  
5       **Q. Mr. Berkenfeld, you have in front of**  
6       **you what I have marked as Exhibit 49, which is a**  
7       **document produced to me by Barclays bearing the**  
8       **Bates range BCI-CG00024954 through 24973.**  
9       **If you would take a moment to read**  
10      **that document and let me know when you're done,**  
11      **please.**  
12      A. Okay.  
13      MR. OXFORD: I have marked a different  
14      version that's a black-lined version, which  
15      is why I marked it again.  
16      A. Okay.  
17      **Q. I'd like to direct your attention to**  
18      **page number 4 of the black line, which has the**  
19      **Bates range 24967.**  
20      **Mr. Gaffey, as I mentioned, marked a**  
21      **clean running version of this document and you**  
22      **said that you had no recollection of seeing it**  
23      **before. Do you have any recollection of seeing**  
24      **the black lined version of this?**  
25      A. I have no specific recollection of any  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       **was inserted in this draft?**  
3       A. I do not.  
4       **Q. Did you have any discussions with**  
5       **anyone at any time about the insertion of this**  
6       **language into this draft?**  
7       A. Not that I recall.  
8       MR. STERN: Let me just note that that  
9       calls for privileged communications.  
10      MR. OXFORD: It calls for a yes --  
11      MR. STERN: No, it calls for  
12      privileged communications so I'm just noting  
13      for the record that you're asking questions  
14      about privilege communications.  
15      MR. OXFORD: I disagree with your  
16      interpretation, but we can have that  
17      argument at a later stage.  
18      A. Not that I recall.  
19      (Exhibit 50, a document bearing Bates  
20      Nos. BCI-CG00027138 through 27148, marked  
21      for identification, as of this date.)  
22      **Q. You have in front of you, Mr.**  
23      **Berkenfeld, Exhibit 50, which is -- I think**  
24      **actually Bob did previously mark --**  
25      **BCI-CG0027138 through 148, and it's a version of**  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       particular draft of any of the clarification  
3       letters.  
4       **Q. Understood. Just one question on**  
5       **this, and I presume that you don't have any**  
6       **recollection of subparagraph 2 of clause 8 that**  
7       **reads, "In connection therewith, Purchaser shall**  
8       **receive cash, cash equivalence, bank deposits or**  
9       **similar cash items maintained (A) by or on**  
10      **behalf of LBI pursuant to Rule 15c3 of the**  
11      **Securities Exchange Act of 1934 or otherwise, or**  
12      **by or on behalf of any clearing agency or**  
13      **clearing organization to collateralize,**  
14      **guarantee, secure (whether as margin, guarantee**  
15      **fund, deposit or in any other form) the**  
16      **obligations of LBI or any other person in an**  
17      **account maintained by or on behalf of LBI."**  
18      MR. STERN: The question is, "I  
19      presume you don't have any recollection of  
20      that subparagraph?"  
21      **Q. The question is, is my presumption**  
22      **correct? Does this refresh your recollection**  
23      **that you have seen this draft?**  
24      A. It does not.  
25      **Q. Do you have any idea why this language**  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       **the clarification letter that was circulated**  
3       **by -- is circulated by Michael Mazzuchi to Isaac**  
4       **Montal with a list of CCs at 6:03 A.M. on**  
5       **Monday, September 22.**  
6       **This is approximately two hours before**  
7       **you signed the clarification letter; is that**  
8       **right?**  
9       A. I don't recall when I signed the  
10      clarification letter precisely.  
11      **Q. Do you recall whether it was sometime**  
12      **early in the morning before the markets**  
13      **closed -- before the markets opened, rather, on**  
14      **Monday, the 22nd?**  
15      A. I believe that the latest I would have  
16      signed it would have been at closing. I don't  
17      remember the exact time of closing.  
18      **Q. If you turn to page 4 and to the same**  
19      **paragraph, "Transfer of Customer Accounts," do**  
20      **you see paragraph 8?**  
21      A. Yes.  
22      **Q. And do you see that the language about**  
23      **margin that I read into the record from the**  
24      **previous draft, Exhibit 49, has been deleted?**  
25      A. I'm not comparing this word-for-word  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 of the last one -- the last one I read, excuse  
3 me.  
4       **Q. Would you have Exhibit 49 in front of**  
5 **you and just put them side-by-side, please.**  
6       A. Yes.  
7       **Q. And do you see that the language about**  
8 **margin has been deleted from the 6:03 A.M.**  
9 **draft?**  
10       MR. STERN: Which specific phrase are  
11 you referring to?  
12       MR. OXFORD: I'm referring to the  
13 deletion of the language "or buy or on  
14 behalf of any clearing agency or clearing  
15 organization to collateralize, guarantee,"  
16 et cetera.  
17       MR. STERN: You're looking at the  
18 redline of Exhibit 49?  
19       MR. OXFORD: Yes. I'm looking at the  
20 language that was redlined in Exhibit 49 and  
21 does not appear in Exhibit 50. It's a  
22 clumsy way to do it, but I don't have a  
23 redline, unfortunately.  
24       MR. STERN: And again, for my benefit,  
25 the precise phrase you're saying was  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Agreement, instead of items referred to in such**  
3 **clauses," and then it goes on to say, "(A) the**  
4 **securities owned by LBI." Mr. Gaffey asked you**  
5 **about that language.**  
6       A. Yes.  
7       **Q. I'm just interested in the language at**  
8 **over the page at subsection C. Purchased assets**  
9 **shall include "exchanged-traded derivatives and**  
10 **collateralized short-term agreements." Do you**  
11 **see that phrase?**  
12       A. Yes.  
13       **Q. Do you understand what the business**  
14 **deal was that is reflected in that agreement?**  
15       A. I do not.  
16       **Q. If you could just keep that version,**  
17 **number 50, in front of you, there's one more**  
18 **question and then I'll move on. Could you have**  
19 **in front of you what's previously been marked as**  
20 **Exhibit 25, please?**  
21       MR. STERN: The final clarification  
22 letter?  
23       MR. OXFORD: The final version of the  
24 clarification letter, Jack.  
25       A. Yes.  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 deleted?  
3       MR. OXFORD: Is the language that  
4 appears five lines up in the draft that I  
5 marked as Exhibit 49: "Or by or on behalf  
6 of any clearing agency or clearing  
7 organization to collateralize, guarantee,  
8 secure (whether as margin, guarantee fund,  
9 deposit, or in any other form) the  
10 obligations of LBI or any other person in an  
11 account maintained by or on behalf of LBI."  
12       MR. STERN: Okay. Thanks.  
13       **Q. I apologize for the painful**  
14 **questioning, Mr. Berkenfeld, but you see that**  
15 **the language has been deleted between the draft**  
16 **that's marked as 49 and the draft that's marked**  
17 **as Exhibit 50?**  
18       A. Yes.  
19       **Q. Staying with Exhibit 50, I'll direct**  
20 **you to paragraph 1(a)(ii), which appears on the**  
21 **page 1 and goes over to page 2 of the document.**  
22       A. Yes.  
23       **Q. And do you see that that clause reads,**  
24 **"with respect to clauses (a), (d) and (e) of the**  
25 **definition of 'Purchased Assets' in the Original**  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       **Q. If you could turn to page 2 and read**  
3 **just to yourself for the moment subparagraph C**  
4 **that we just read in Exhibit 50.**  
5       A. Yes.  
6       **Q. And do you see between the draft**  
7 **that's marked as Exhibit 50 and the final**  
8 **version that you signed that was marked as**  
9 **Exhibit 25, you'll see a parenthetical has been**  
10 **added?**  
11       A. Yes.  
12       **Q. You see that instead of reading in**  
13 **Exhibit 50 "exchange-traded derivatives and**  
14 **collateralized short-term agreements," it now**  
15 **reads, "exchange-traded derivatives (and any**  
16 **property that may be held to secure obligations**  
17 **under such derivatives) and collateralized**  
18 **short-term agreements."**  
19       A. I see that, yes.  
20       **Q. Do you see that change? Do you have**  
21 **any understanding of the business deal that is**  
22 **reflected in that change?**  
23       A. I do not.  
24       **Q. I think I'm done with the**  
25 **clarification letter, I'm sure you'll be pleased**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 to know.  
3 Have you ever heard of a document  
4 called a Transfer and Assumption Agreement, Mr.  
5 Berkenfeld, that was signed between the OCC,  
6 Barclays and the SIPA Trustee in connection with  
7 this transaction?  
8 A. I was very briefly shown that  
9 document, I believe, in preparation for  
10 deposition, but I had not seen it before then  
11 that I could recall.  
12 Q. I'm just going to mark it and then  
13 move on.  
14 (Exhibit 51, Transfer and Assumption  
15 Agreement, marked for identification, as of  
16 this date.)  
17 Q. Okay. Mr. Berkenfeld, I have marked  
18 as Exhibit 51 what I'll represent to you is the  
19 final version of the Transfer and Assumption  
20 Agreement between Barclays Capital, the OCC and  
21 the SIPA Trustee. Is this a document that you  
22 saw in preparation for your deposition?  
23 A. I believe it is.  
24 Q. Have you seen it at any time prior to  
25 that?

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. Not that I recall.  
3 Q. Do you recall discussing this document  
4 with anybody prior to your deposition  
5 preparation?  
6 A. I do not.  
7 Q. That's all I have on that document.  
8 Can you tell me, please, what your  
9 role was, if any, with respect to the  
10 involvement of DTC in the closing of the  
11 transaction between Lehman and Barclays?  
12 MR. STERN: Objection to the form.  
13 A. As I testified earlier, I had some  
14 involvement with DTC after the closing of the  
15 transaction around the issue of client accounts,  
16 customer accounts in transferring positions in  
17 that, but prior to the closing, I don't recall  
18 any involvement with DTC and DTC -- well, any  
19 involvement with the DTC. I don't recall any.  
20 Q. Did you at any point come to  
21 understand that DTC wanted Barclays to step into  
22 Lehman's shoes at the DTC?  
23 A. I have a vague recollection of that.  
24 Q. Can you tell me what you recall?  
25 A. Not that much more than that, other

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 than just conversation that had come up that  
3 that's what -- and it might have been after --  
4 it might have been post-closing conversation,  
5 too. It might have been around the issue of  
6 customer accounts.  
7 Q. To the best of your recollection, you  
8 don't recall having any discussions with anyone  
9 about DTC over the weekend of September 20 and  
10 September 21?  
11 A. I do not recall that.  
12 Q. Do you recall discussing with anybody  
13 a letter agreement between DTC, the Trustee, and  
14 Barclays?  
15 A. I don't recall that.  
16 Q. I'm just going mark it and we can move  
17 on.  
18 (Exhibit 52, a letter dated September  
19 22, 2008, from DTC, marked for  
20 identification, as of this date.)  
21 A. Yes.  
22 Q. Did you ever see that letter before?  
23 A. Not that I recall.  
24 Q. Do you ever recall discussing the  
25 subject matter of this letter with anybody?

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. I do not.  
3 Q. Did you understand that there was a  
4 different team negotiating this letter than was  
5 negotiating the clarification letter that you  
6 signed?  
7 A. A different team from?  
8 Q. A different team of personnel,  
9 different lawyers?  
10 A. I don't know. There could have been  
11 some overlap on who was involved in it. I don't  
12 know --  
13 Q. You just have no idea?  
14 A. I don't know.  
15 (Exhibit 53, a document bearing Bates  
16 Nos. BCI-EX-(S)-00007181, marked for  
17 identification, as of this date.)  
18 Q. Mr. Berkenfeld, I have put in front of  
19 you a one-page document produced to me by  
20 Barclays, Bates No. BCI-EX-(S)00007181. If you  
21 could take a look at it and let me know when  
22 you've had a chance to read through it.  
23 (Document review.)  
24 A. I've read through it, yes.  
25 Q. Who is Scott Willoughby?

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. Scott Willoughby is a -- he was an  
3 attorney at Lehman Brothers who ran our Capital  
4 Markets Contracts Group, or previously known as  
5 Transaction Execution Group. So this was a  
6 documentation effort, and he transferred over to  
7 Barclays and left the Legal Department there and  
8 I believe he's working in the Prime Brokerage  
9 Department, I believe.  
10 **Q. And Marlisa -- I'm going to murder**  
11 **this -- Vinciguerra?**  
12 A. Exactly. She was a lawyer at Lehman  
13 Brothers that was head of the Equities Division  
14 legal effort, legal coverage effort, the general  
15 counsel of Equities, and she is now employed by  
16 Barclays and is an attorney for Barclays.  
17 MR. STERN: I just want to note for  
18 the record this may be a document that we  
19 produced inadvertently. It may be  
20 privileged communication. I'll just need to  
21 consult with one of my partners on whether  
22 we produced this inadvertently and, if so,  
23 whether it's something we need to claw back.  
24 MR. OXFORD: Okay.  
25 MR. STERN: I'll look into that.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **from BarCap, so we don't have adequate specifics**  
3 **yet. Thanks."**  
4 MR. STERN: What's the question?  
5 **Q. Do you recall receiving this e-mail?**  
6 A. I don't recall.  
7 **Q. Do you know why Mr. Willoughby would**  
8 **e-mail this question to you?**  
9 A. I'm speculating, but he had reported  
10 to me when he was at Lehman and was looking for  
11 guidance on who might have been closest to these  
12 issues that he can get some interpretation from.  
13 **Q. Do you agree with Mr. Willoughby's**  
14 **interpretation of what Mr. Tonucci says, that**  
15 **it's an open question whether BarCap is**  
16 **entitled --**  
17 A. I have --  
18 **Q. -- to the minimum margin?**  
19 A. I have no view on that. I'm sorry.  
20 **Q. Do you think Mr. Willoughby is asking**  
21 **you because he considers you an expert on the**  
22 **APA?**  
23 A. No, I think --  
24 MR. STERN: Objection. Objection to  
25 the form.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 MR. OXFORD: Once you've done that,  
3 Jack, we can have the appropriate  
4 discussion.  
5 MR. STERN: Right.  
6 **Q. But, meantime, I'll note for the**  
7 **record, this is an e-mail sent to you, Mr.**  
8 **Berkenfeld, by Mr. Willoughby on Tuesday,**  
9 **September 30, 2008, at 3:49 in the afternoon. I**  
10 **guess that's Greenwich Mean Time, so that's**  
11 **11:49 Eastern Standard Time.**  
12 MR. Willoughby writes to you, "Steven,  
13 I have spoken to Paolo Tonucci and Alan Kaplan,  
14 an attorney at BarCap, regarding the transfer of  
15 OCC positions and required margin from LEH's  
16 account at JPMorgan to BarCap. The main open  
17 question from Paolo's perspective is whether  
18 BarCap is entitled only to the minimum margin  
19 necessary to carry the position and as of when  
20 that amount is calculated."  
21 He goes on, "He feels that we will  
22 need to discuss it with an 'expert' on the APA.  
23 Please let me know if there's someone I should  
24 liaise with in Legal with respect to this issue.  
25 Paolo is waiting on data from Vincent Chiaravino  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. I think he's asking me to direct him  
3 to an expert. That's exactly what it says.  
4 Otherwise, he just would have asked me the  
5 question.  
6 **Q. You don't recall discussing this**  
7 **e-mail with anybody?**  
8 A. I don't recall discussing it.  
9 **Q. You don't know what happened to his**  
10 **request?**  
11 A. I don't know what happened to his  
12 request.  
13 **Q. As best you know, the trail ended**  
14 **cold?**  
15 MR. STERN: Objection to the form.  
16 A. No, I just don't recall. I would  
17 imagine we had a conversation, but I don't  
18 recall what it was.  
19 (Exhibit 54, a document bearing Bates  
20 Nos. BCI-EX-(S)-00007197 through 7201,  
21 marked for identification, as of this date.)  
22 **Q. This is the last document I have, Mr.**  
23 **Berkenfeld, marked Exhibit 54, Bates range**  
24 **BCI-EX-(S)-00007197 through 7201.**  
25 **Could you take a look at it and let me**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 know when you've had a chance to review it,  
3 please.  
4 (Document review.)  
5 A. Yes.  
6 Q. Do you recall seeing this document  
7 before?  
8 A. I recall the base document. I don't  
9 precisely recall the handwritten markup to the  
10 document, but I do recall sending this document  
11 over to David for his comments.  
12 Q. Was the base document, as you describe  
13 it, which appears to be a one-page section of  
14 prose entitled "General Information Regarding  
15 the Lehman Transaction" followed by three pages  
16 of a chart? That's the base document you  
17 referred to?  
18 A. Yes.  
19 Q. Was the base document something you  
20 created?  
21 A. It was not.  
22 Q. Was it something that was created for  
23 you?  
24 A. It was not created for me at my  
25 request. It was -- it wasn't created -- I  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. I sent it back to whoever originally  
3 prepared it.  
4 Q. To Barclays' attorney, whose name you  
5 don't recall?  
6 A. It's not the name I don't recall. I  
7 just don't remember who was doing the document  
8 back then. It's not that I have forgotten their  
9 names. I just don't remember who was the author  
10 of it. And when I did it, since I marked it up  
11 by hand, I would have faxed it back to someone,  
12 but I didn't keep the fax cover page. So I  
13 didn't do it electronically in an e-mail, as far  
14 as I know.  
15 I just don't remember who was the  
16 original author. I know that I marked it up. I  
17 don't recall whether David's markup was of the  
18 original document or the document after I had  
19 already submitted my modifications to it.  
20 Q. That's my next two questions. Do you  
21 recall discussing this document with anyone?  
22 A. Not specifically, other than saying to  
23 someone my markup's coming over.  
24 Q. Did you forward it to Mr. Murgio for  
25 his comments?  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 didn't request it. It was created by someone in  
3 Barclays Legal, I don't recall who, who then  
4 circulated it for comments. It was meant to be  
5 a relatively simple and summary version of what  
6 was transferred in the transaction.  
7 Q. Okay. For what purpose was it sent to  
8 you, if you know?  
9 A. It was sent to me for my comments.  
10 Q. And did you have comments on it?  
11 A. Yes, I did.  
12 Q. Did you review it?  
13 A. Yes.  
14 Q. Did you mark it up?  
15 A. Yes.  
16 Q. These are not your markups, correct?  
17 A. No, they are not.  
18 Q. These appear to be Mr. Murgio's  
19 markup, right?  
20 A. They appear to be that way.  
21 Q. Did you mark it up by hand or in some  
22 electronic form?  
23 A. By hand.  
24 Q. And what did you do with it when you  
25 marked it up?  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. Yes.  
3 Q. Why did you do that?  
4 A. Because he was our -- Lehman's counsel  
5 on the transaction, and I thought a document  
6 that would be used as a summary of the  
7 transaction for internal purposes would benefit  
8 from an outside counsel's review of it and  
9 outside counsel who have been involved in the  
10 preparation of the basic transaction documents.  
11 Q. It appears from the e-mail that you  
12 are sending it to yourself at your home account,  
13 is that an accurate statement?  
14 A. Yes.  
15 Q. Do you remember why you sent it to  
16 yourself at home?  
17 A. This is GMT.  
18 Q. That's what it says.  
19 A. So it would have been at -- so it  
20 would have been at the middle in the afternoon,  
21 right?  
22 Q. Yes, 2:34 Eastern.  
23 A. Yeah, I don't know why I would have  
24 sent it to my home at that time. I can't  
25 explain, unless I wasn't in the office that day.  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       MR. OXFORD: I don't have any further  
3       questions for you at this time, Mr.  
4       Berkenfeld.  
5       EXAMINATION BY  
6       MS. TAGGART:  
7       **Q. Hi again. I'm Erica Taggart and I**  
8       **represent the Committee. I want to ask you a**  
9       **couple questions about the definition of**  
10      **"purchased assets" and it might help if you get**  
11      **in front of you Exhibit 1, which is the APA.**  
12      A. Exhibit 1 or Exhibit 11?  
13      **Q. I think it's originally Exhibit 1.**  
14      **Then the schedule at Exhibit 19 and**  
15      **the clarification letter at Exhibit 25.**  
16      **So on the APA, which is Exhibit 1, in**  
17      **particular, in the definition of "purchased**  
18      **assets," I think you answered a lot of questions**  
19      **about Section D, which is about the approximate**  
20      **\$70 billion of government securities, commercial**  
21      **paper, et cetera, and I think that you said that**  
22      **that valuation was an estimate that was**  
23      **reflected on the schedule at Exhibit 19, but**  
24      **that Exhibit 19 was merely guidance and it**  
25      **didn't define the assets or the value that would**  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       A. It was along the lines as set forth on  
3       Exhibit 19. Just by way of example, 40 billion  
4       of government securities, 1.1 of commercial  
5       paper.  
6       **Q. Well, was it your understanding that**  
7       **the sense was that the value of those assets**  
8       **would be as described in the value, or that**  
9       **there were assets that were actually picked out**  
10      **that at that time had that value?**  
11      MR. STERN: Objection to the form.  
12      Can we have that reread?  
13      (Record read.)  
14      A. My sense was that it wasn't  
15      necessarily that precise; that someone could  
16      create a specific schedule by Cusip and by  
17      specific attributable value. I think that there  
18      was a good idea of the assets that would  
19      comprise the 70 billion, and that there was  
20      probably more specificity in some of these  
21      categories than others, but I didn't get the  
22      sense that anyone was in a position at that  
23      point to say here are the specific securities.  
24      **Q. Where did your sense come from?**  
25      A. Came from the discussions around the  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       **be transferred; is that right?**  
3       MR. STERN: Objection to the form.  
4       A. Substantially correct, yes.  
5       **Q. And I think you also said there was --**  
6       **it was an estimate of the value of assets that**  
7       **would be transferred as guidance for what was**  
8       **meant in the APA when it referred to purchased**  
9       **assets; does that sound about right?**  
10      MR. STERN: Objection to the form.  
11      A. That one I didn't follow as carefully.  
12      **Q. Well, let me ask this: At the time**  
13      **that you signed the APA, was it your**  
14      **understanding that there had been any selection**  
15      **of assets that were going to be transferred?**  
16      MR. STERN: Objection to the form.  
17      A. It was my understanding at the time of  
18      signing the APA that there was a sense of the  
19      bucket of assets would be transferred, the  
20      estimated amount and estimated allocation. I  
21      don't know if anyone had figured out specific  
22      Cusip numbers at that point.  
23      **Q. What was your understanding of what**  
24      **was the sense of the bucket of assets that would**  
25      **be transferred when you signed the APA?**  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       table.  
3       **Q. Do you remember what anyone said in**  
4       **particular about the bucket of assets that had**  
5       **been considered at that time?**  
6       MR. STERN: Objection to the form.  
7       A. I don't remember anything specific.  
8       **Q. And do you remember anything specific**  
9       **that was said about the value of the assets**  
10      **beyond what we see in just Exhibit 19?**  
11      A. No, I don't remember anything  
12      specific.  
13      **Q. Was there a determination when you**  
14      **signed the APA that the assets would be roughly**  
15      **equal to the liabilities that Barclays was**  
16      **assuming?**  
17      MR. STERN: Objection to the form.  
18      A. When I signed the Asset Purchase  
19      Agreement, the understanding was that there  
20      would be purchased assets, transferred assets  
21      that had a book value as of that date of  
22      approximately 70 million, and that there would  
23      be liabilities transferred, assumed liabilities,  
24      of approximately -- I'm just trying to remember  
25      if I put 69 or 68 -- 69 billion, and that there  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 would be other liabilities that were assumed by  
3 Barclays in the transaction. And of course  
4 there were other -- there was other  
5 consideration that was being paid.

6 **Q. When was the first time that you think**  
7 **that assets that were going to be transferred**  
8 **were determined?**

9 A. The specific assets that were going to  
10 be transferred?

11 **Q. Yes.**

12 A. I don't know.

13 **Q. Do you think that that happened before**  
14 **or after the September 19 court sale hearing?**

15 A. Given everything that happened over  
16 the weekend, the specific assets I would think  
17 might have happened afterwards, but I don't  
18 know.

19 **Q. We talked about how you learned at the**  
20 **court hearing how the value of assets that would**  
21 **be transferred had gone down between the signing**  
22 **of the APA and the court hearing, right?**

23 A. I said that that's the first time that  
24 I recall knowing that the aggregate value would  
25 go down. I think you said the value of the

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 assets had gone down. I didn't know if the  
3 value of the assets had gone down. It was along  
4 the lines of a question that had been asked  
5 before. You asked the question as though  
6 valuation had come down.

7 **Q. What was your understanding of what**  
8 **went down from a 70-something billion figure to**  
9 **a 40-something billion figure between the**  
10 **signing of the APA and the court hearing?**

11 MR. STERN: Objection to the form.

12 A. It was not my understanding that a  
13 bucket of assets that on Tuesday were believed  
14 to be worth 70 billion were now worth 42 billion  
15 or so, whatever the number was. So I think that  
16 answers your question.

17 I don't think that there was a loss of  
18 value of 28 billion of the same securities. I  
19 think that the securities that were being  
20 transferred over were a different bucket. Some  
21 of it might have been around value. Some of it  
22 might have been around what was in the bucket.

23 **Q. What's your understanding based on**  
24 **that there was a bucket of securities that had**  
25 **changed between the Tuesday signing of the APA**

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **and the Friday court hearing?**

3 A. My understanding was based on a number  
4 of things, including difference in the value,  
5 and not any information or knowledge of any  
6 reassessment of the value or a mark of that --  
7 of all of those positions.

8 **Q. And between the time that you signed**  
9 **the APA and the court hearing, did you discuss**  
10 **with anyone about what was the current bucket of**  
11 **assets that were going to be transferred in the**  
12 **agreement that you signed?**

13 A. I don't recall a conversation along  
14 those lines.

15 **Q. I think you also mentioned -- there**  
16 **was a lot of discussion about how Exhibit 19 had**  
17 **guidance but was not actually part of the APA,**  
18 **right?**

19 A. Correct.

20 **Q. And that it was the APA itself that**  
21 **was going to govern what was being transferred**  
22 **as far as the assets, right?**

23 A. As of the date of the signing of the  
24 APA, yes.

25 **Q. What criteria do you believe is in the**

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **APA about what assets were agreed to be**  
3 **transferred?**

4 MR. STERN: Objection to the form.

5 A. I haven't gone back and read the whole  
6 agreement, but as far as I know, it's the  
7 definition of "purchased assets" in this  
8 particular case, subparagraph D.

9 **Q. Well, do you believe that there was an**  
10 **agreement that the assets that would be**  
11 **transferred, whatever they were, would**  
12 **approximate a value of \$70 billion?**

13 A. You want to repeat the question?

14 I can read it off the screen.

15 (LiveNote review.)

16 A. My understanding was that there was an  
17 agreement that the purchased assets would have  
18 an estimated value at the time of the Asset  
19 Purchase Agreement of \$70 billion.

20 **Q. So you believe when you were signing**  
21 **the APA Lehman was agreeing to transfer assets**  
22 **that had a value as of the date of the APA of**  
23 **\$70 billion?**

24 A. I believe that that was the estimated  
25 value of the assets that were going to be

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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 transferred over, yes.  
3       **Q. And you believed that was -- that**  
4 **actually was the estimated value, but I kind of**  
5 **want to know what was agreed to be binding.**  
6       Let me ask it this way: I think  
7 you're saying there weren't ever schedules or  
8 there weren't schedules for the APA that said  
9 exactly what securities were going to be  
10 transferred, right?  
11       A. No, there were not.  
12       **Q. But was there agreement that whatever**  
13 **those assets that would be transferred would be**  
14 **valued at \$70 billion as of the value -- sorry**  
15 **as of the date that you signed the APA?**  
16       MR. STERN: Objection to the form.  
17 I just think, in fairness to the  
18 witness, since you're asking him about terms  
19 of APA, he should be allowed to refer to the  
20 APA.  
21       MS. TAGGART: He may refer to the APA.  
22       A. I'm sorry, the problem I have with  
23 your question is it's a little unclear. So let  
24 me restate it. I think the understanding was  
25 that there would be assets transferred that had  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 assets to be transferred.  
3       **Q. So when you signed it, do you believe**  
4 **that there is any limitation in the APA that**  
5 **would govern exactly what assets are going to be**  
6 **transferred?**  
7       A. Any limitation?  
8       MR. STERN: Objection to the form.  
9       A. Yes, I think there's some limitations  
10 on the assets that would be transferred. As I  
11 mentioned before, I don't think there was the  
12 ability to transfer 70 billion worth of  
13 corporate equity or 70 billion worth of  
14 derivatives. I think there was a sense that  
15 this bucket of 70 billion would approximate the  
16 allocations that were set forth on the schedule.  
17       By the way, I should just note we  
18 talked about 70 in the schedules. It's 72.65.  
19 We went through that before. But we'll just for  
20 ease of reference make it 70 billion in this  
21 subparagraph D.  
22       **Q. Yeah, we'll just focus on the**  
23 **subparagraph D, which is the 70 billion. And I**  
24 **think that you just said that you do believe as**  
25 **part of the APA that there would be an**  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 an estimated book value as of the date of the  
3 APA of 70 billion. I think you may have asked  
4 the question was there an agreement that \$70  
5 billion worth of assets were transferred -- I'm  
6 adding the words "at closing," you didn't say  
7 that, and that's not correct.  
8       **Q. Right.**  
9       A. It was that there was a bucket of  
10 assets that were going to be transferred that,  
11 as of the date of the Asset Purchase Agreement,  
12 had a value of approximately 70 billion. What  
13 their value might have been whenever the closing  
14 occurred, that was not something that the APA  
15 addressed.  
16       **Q. So the APA you think does not specify**  
17 **what the value of the assets has to be upon**  
18 **closing, right?**  
19       A. I don't believe it says that there has  
20 to be -- that this bucket of assets has to  
21 retain its value at 70 billion.  
22       **Q. And it's your understanding the APA**  
23 **also does not say what particular assets need to**  
24 **be transferred by closing, right?**  
25       A. The APA does not specify the specific  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **approximate allocation that was the same as**  
3 **Exhibit 19?**  
4       MR. STERN: Objection to the form.  
5       A. It was my understanding that there  
6 would be a transfer of assets that approximated  
7 the allocations on Exhibit 19.  
8       **Q. Are there any other criteria that you**  
9 **believe were contractual criteria that were**  
10 **agreed to in the APA as to what assets would be**  
11 **transferred from Lehman to Barclays?**  
12       A. When you're referring to assets, you  
13 mean assets of the type in D? Not all -- not  
14 furniture and equipment and all the other  
15 assets, you mean these long positions as  
16 defined?  
17       **Q. Yes.**  
18       A. I have not read through the agreement  
19 again. At this point in time, I'm not aware of  
20 any other provision, but there could be  
21 something in here in the reps and warranties or  
22 some other provision that might also be  
23 relevant.  
24       **Q. Now, for the clarification letter that**  
25 **you ultimate signed, you know that there were**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 attached schedules, a Schedule A and B, that is  
3 referred to in Section 1(ii), right?  
4 A. So I understand, yes.  
5 Q. And I believe you testified you never  
6 saw those schedules?  
7 A. I don't recall seeing the schedules.  
8 Q. Do you know when they were prepared?  
9 A. I don't know when they were prepared  
10 and I did not testify I never saw them. I just  
11 don't recall whether I saw them.  
12 Q. Do you know whether they existed  
13 before you signed the clarification letter?  
14 A. I do not recall.  
15 Q. Did you ever see any schedule that  
16 actually listed assets that would be  
17 transferred?  
18 A. I think in one of the exhibits earlier  
19 today I saw -- it's probably this big fat one  
20 that showed me a bunch of securities. I don't  
21 recall whether I had seen lists earlier.  
22 Q. Do you know whether the list, the  
23 first time there was any list of assets that  
24 would be transferred, do you know whether that  
25 was in existence before or after the court  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 this reflected the agreement that had been  
3 reached.  
4 Q. Do you know whether the value of the  
5 assets that were transferred ultimately, as  
6 reflected in the clarification letter and  
7 schedules, was more or less than what was told  
8 to the court on the 19th?  
9 A. I have no idea.  
10 Q. Do you know if ultimately the assets  
11 that were transferred from Lehman had a value  
12 that was equal to the liabilities that were  
13 assumed by Barclays in the final deal?  
14 A. Let me just read through the question  
15 again.  
16 I do not know.  
17 Q. Did you ask anyone whether anything  
18 about the relationship between the assets that  
19 would be transferred and the liabilities assumed  
20 before you agreed to sign the clarification  
21 letter?  
22 MR. STERN: Objection to the form.  
23 A. Not that I recall.  
24 Q. Do you remember asking at any time  
25 after signing the APA whether the assets that  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 hearing on September 19?  
3 A. I don't know.  
4 Q. Do you know whether there was any  
5 selection of any assets that were being valued  
6 at the time of the court hearing on September  
7 19?  
8 MR. STERN: Objection to the form.  
9 A. I don't know.  
10 Q. The final deal is reflected with the  
11 clarification letter. Do you have an  
12 understanding of what was the value of the  
13 assets that actually were transferred from  
14 Lehman to Barclays?  
15 A. I don't think I do have direct  
16 knowledge of that.  
17 Q. Did you ask before you signed the  
18 clarification letter what were the value of the  
19 assets that Lehman was transferring?  
20 A. I do not recall asking that question.  
21 I recall the statement made in court by Weil  
22 Gotshal about the value of the assets were being  
23 transferred. I do not know the basis for the  
24 statement made by Weil, and I do know that I had  
25 the confirmation from the attorneys at Weil that  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 were contemplated would be transferred to  
3 Barclays were -- what the relationship was  
4 between that value and the value of the  
5 liabilities that Barclays was assuming?  
6 A. I don't recall a conversation with  
7 anyone specifically about how the assets  
8 measured against the liabilities after the  
9 signing of the APA.  
10 Q. And when you signed the clarification  
11 letter, it's your recollection you never asked  
12 whether the assets were matching the  
13 liabilities?  
14 A. I don't recall any conversation about  
15 a matched book or whether the assets matched  
16 liabilities.  
17 Q. And is it right you've never seen any  
18 valuation of the assets that were actually  
19 transferred?  
20 A. I don't recall ever seeing a valuation  
21 of the assets that were actually transferred.  
22 Q. Do you know whether there was any  
23 valuation that happened of the assets being  
24 transferred following the September 19 hearing?  
25 A. I don't know.  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **Q. And do you know whether the -- I think**  
3 **I asked this, but I'll make sure: Do you know**  
4 **whether the assets that were ultimately**  
5 **transferred had a value that was greater or less**  
6 **than what was represented to the court on the**  
7 **19th?**

8 A. I don't know.

9 **Q. Do you know who would know that?**

10 A. I think that Paolo Tonucci and Martin  
11 Kelly would be a good place to start. Weil  
12 Gotshal may know that.

13 **Q. Do you have any reason to think that**  
14 **the value of assets would have changed between a**  
15 **Friday hearing and the signing of the**  
16 **clarification letter?**

17 MR. STERN: Objection to the form.

18 A. Do I have any reason to think that the  
19 value would have changed? Well, there were  
20 quite a few discussions over that weekend around  
21 the financing and JPMorgan, and so would I have  
22 a reason to think there might have been a change  
23 in the value? I'd have a reason to think there  
24 might have been. I have no knowledge whether  
25 there was and how all of those discussions over

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 the weekend to get to closing actually affected  
3 the value of the securities, but I would have  
4 reason to think that there may have been some  
5 change.

6 **Q. Was there any factors that would have**  
7 **changed the market value of an asset between the**  
8 **closing of the market on the end of the day on**  
9 **Friday and before the market opened in the**  
10 **morning of Monday?**

11 A. The market value of the assets? Yeah,  
12 I think there probably were some factors,  
13 including that the closing of the deal happened  
14 before the market opened in New York but not  
15 before the market opened in Asia and Europe.

16 So I don't know -- and there may have  
17 been other events that happened over the  
18 weekend. There were other events that were  
19 happening over the weekend politically from a  
20 regulatory standpoint that also might have  
21 affected the value of things, like U.S.  
22 treasuries.

23 **Q. Did Lehman have a pattern and practice**  
24 **of marking the value of securities on a daily**  
25 **basis when the market was opened?**

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD

2 A. Yes, Lehman had that practice.

3 **Q. And did it have any practice of**  
4 **changing those marks when the market was closed**  
5 **over the weekend?**

6 A. I am not familiar enough to know what  
7 the full practice of our marking of our books  
8 and records to know the timing of when positions  
9 were marked and whether positions were revised  
10 over the weekend. I don't know.

11 I would comment that our normal  
12 practices did not contemplate the volatility  
13 that was in the market during this period of  
14 time.

15 **Q. I think you also said when Mr. Gaffey**  
16 **was questioning that you had no intention when**  
17 **you signed the APA that Barclays was receiving**  
18 **an embedded gain in the assets?**

19 MR. STERN: Objection.

20 **Q. Is that correct?**

21 MR. STERN: Objection to the form.

22 A. I don't recall exactly what I said,  
23 but I said that it was not my understanding with  
24 everyone sitting around the table that there was  
25 a common held view that there were assets being

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 transferred to Barclays to create some sort  
3 of -- at a discount to create some sort of  
4 embedded gain.

5 **Q. Is the same true when you signed the**  
6 **clarification letter?**

7 A. As far as I know, when the  
8 clarification letter was signed, the -- all of  
9 the people around the room, all of the attorneys  
10 involved did not have an understanding that  
11 there was an intent to transfer a discount, an  
12 embedded gain to Barclays.

13 **Q. And you, in particular, as the person**  
14 **who signs the clarification letter, did you**  
15 **believe that there was any intent to transfer a**  
16 **discount for the assets that were going to**  
17 **Barclays?**

18 MR. STERN: Objection to the form.

19 A. I did not believe that there was any  
20 intent to transfer securities at a discount to  
21 create a gain for Barclays.

22 MS. TAGGART: That's all the questions  
23 I have. Thank you.

24 THE WITNESS: Thank you.  
25 (Discussion off the record.)

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 EXAMINATION BY  
3 MR. GAFFEY:

4 Q. Mr. Berkenfeld, Exhibit 50 reflects  
5 that there were -- there was still drafting  
6 going on with respect to the clarification  
7 letter at 6:03 A.M. on Monday, September 22. Do  
8 you see that? Just based on the date of the  
9 e-mail.

10 MR. STERN: I'll object to the form.  
11 That's a statement. Are you asking him if  
12 he agrees?

13 MR. GAFFEY: Yes.

14 MR. STERN: That there was still  
15 drafting going on?

16 A. I don't know enough about what form  
17 Michael sent over to this group, which was a  
18 group that was a different distribution group,  
19 included SIPAC and Hughes Hubbard, so I don't  
20 know if he was sending him the latest version of  
21 the agreement at the time or if he was  
22 sending -- it said current version, but it could  
23 have been a draft that was hours old. I don't  
24 know.

25 Q. Does the suggestion of this document  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 that there was a working draft in existence at  
3 6:03 A.M. on Monday morning refresh your  
4 recollection as to whether you signed the  
5 clarification letter on Sunday night or Monday  
6 at the closing?

7 A. I don't recall specifically, but if  
8 you ask for my best recollection, it would have  
9 been at about the time of the closing.

10 Q. And Ms. Taggart asked you about  
11 Lehman's pattern and practice with respect to  
12 marking securities. Do you know whether all  
13 types of securities were marked every day?

14 A. I do know that not all types of  
15 securities were marked every day. We did not  
16 mark our entire book of securities on a daily  
17 basis. We owned lots of level 3 securities,  
18 esoteric securities, and so we didn't go through  
19 a daily process of marking those. Some of those  
20 positions would be marked on a monthly or even a  
21 quarterly basis.

22 MR. GAFFEY: I have nothing else.

23 EXAMINATION BY

24 MR. STERN:

25 Q. You were asked some questions about  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 whether --

3 A. Are you allowed to ask me questions?

4 Q. I am, sir.

5 You were asked some questions about  
6 whether there was an intent to transfer an  
7 embedded gain and an intent to transfer  
8 securities at a discount, and I believe, correct  
9 me if I'm wrong, that you testified that you  
10 were not aware that all the parties around the  
11 table had any understanding, any common  
12 understanding, that the values were such that  
13 there was a discount or an embedded gain. Can  
14 you explain what you mean by that?

15 A. In terms of the security positions, it  
16 was my understanding that everyone sitting  
17 around the table preparing the agreement, the  
18 lawyers for the two parties at the time, were  
19 not of the common understanding that part of the  
20 transaction was to deliver securities at a  
21 discount to their then value to Barclays.

22 Q. And do you have any knowledge  
23 concerning whether there was any discussion  
24 among the business term negotiators concerning  
25 the possibility of such a discount?

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD

2 A. I have no knowledge.

3 MR. STERN: I have nothing else.

4 MR. GAFFEY: Thanks for your time.  
5 (Time Noted: 4:57 P.M.)  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19

20 STEVEN BERKENFELD

21 Subscribed and sworn to  
22 before me this day  
23 of 2009.  
24  
25

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 CERTIFICATE  
3 STATE OF NEW YORK )  
4 : ss  
5 COUNTY OF NEW YORK)  
6 I, Kathy S. Klepfer, a Registered  
7 Merit Reporter and Notary Public within and  
8 for the State of New York, do hereby  
9 certify:  
10 That STEVEN BERKENFELD, the witness  
11 whose deposition is herein before set forth,  
12 was duly sworn by me and that such  
13 deposition is a true record of the testimony  
14 given by such witness.  
15 I further certify that I am not  
16 related to any of the parties to this action  
17 by blood or marriage and that I am in no way  
18 interested in the outcome of this matter.  
19 I further certify that neither the  
20 deponent nor a party requested a review of  
21 the transcript pursuant to Federal Rule of  
22 Civil Procedure 30(e) before the deposition  
23 was completed.  
24 In witness whereof, I have hereunto  
25 set my hand this 6th day of August, 2009.

-----  
KATHY S. KLEPFER, RPR, RMR, CRR, CLR  
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2 INDEX (Cont'd.)  
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4 Exhibit 25, a letter dated September 135  
5 20, 2008  
6 Exhibit 26, Notice of Filing of 159  
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8 Exhibit 28, a document bearing Bates 183  
9 Nos. BCI-CG00011047 through 11050  
10 Exhibit 29, a document bearing Bates 183  
11 Nos. 10284821 through 10279830  
12 Exhibit 30, an e-mail string, the first 183  
13 of which from P. Dowd to A. Keller, et al.  
14 Exhibit 31, a document bearing Bates 183  
15 Nos. 10279029 through 10279862  
16 Exhibit 32, a document bearing Bates 183  
17 Nos. BCI-EX-00059913 through 59929  
18 Exhibit 33, a document bearing Bates 183  
19 Nos. 10284801 through 10286514  
20 Exhibit 34, a document bearing Bates 183  
21 Nos. 10279028 through 10279851  
22 Exhibit 35, a document bearing Bates 184  
23 Nos. 10284822 and 10279863 through  
24 10279864  
25

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5 Mr. Oxford 240  
6 Ms. Taggart 278  
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9 Exhibit 17, a document bearing Bates 20  
10 Nos. BCI-EX-00077288 through 77290  
11 Exhibit 18, a document bearing Bates Nos. 43  
12 BCI-CG00033789  
13 Exhibit 19, one-page document, showing 43  
14 columns of assets and liabilities, dated  
15 9/16/2008 at 11:18 A.M.  
16 Exhibit 20, a document bearing Bates 67  
17 Nos. 132841  
18 Exhibit 21, a document bearing Bates 73  
19 Nos. 10309627  
20 Exhibit 22, Barclays PLC Results 125  
21 Announcement, Figures 2008  
22 Exhibit 23, a document bearing Bates 129  
23 Nos. 70283  
24 Exhibit 24, First Amendment to the Asset 135  
25 Purchase Agreement  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 INDEX (Cont'd.)  
3 EXHIBITS: PAGE  
4 Exhibit 36, a document bearing Bates 184  
5 Nos. BCI-CG00024252 through 24271  
6 Exhibit 37, a document bearing Bates 184  
7 Nos. BCI-CG00024954 through 24973  
8 Exhibit 38, a document bearing Bates 184  
9 Nos. 10283756 with attachments  
10 Exhibit 39, e-mail from S. Berkenfeld 200  
11 to Beth Rudofker dated Saturday, September  
12 20, at 1:07 P.M.  
13 Exhibit 40, a document bearing Bates 204  
14 Nos. STB-LEH0000272 through 277  
15 Exhibit 41, a document bearing Bates 208  
16 Nos. 10266839 with attachment  
17 Exhibit 42, a document bearing Bates 221  
18 Nos. 10283125 with attachment  
19 Exhibit 43, a document bearing Bates 224  
20 Nos. 10270558  
21 Exhibit 44, a document bearing Bates 227  
22 Nos. 459686  
23  
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2       INDEX (Cont'd.)  
3       EXHIBITS:                               PAGE  
4       Exhibit 45, a one-page e-mail from Ian   229  
5       Lowitt to Steven Berkenfeld, Bart McDade,  
6       Alex Kirk, Paolo Tonucci, CC to James  
7       Seery, dated 9/22/08 at 7:23 A.M. entitled  
8       "Looks Like We're All Set"  
9       Exhibit 46, a document bearing Bates   233  
10      Nos. BCI-CG00034704 through 34707  
11      Exhibit 47, a document bearing Bates   235  
12      Nos. BCI-CG00035134 through 35955  
13      Exhibit 48, an e-mail from Monty Forrest 251  
14      to Alastair Blackwell and others  
15      Exhibit 49, a document bearing Bates Nos. 258  
16      BCI-CG00024954 through 24972  
17      Exhibit 50, a document bearing Bates Nos. 260  
18      BCI-CG00027138 through 27148  
19      Exhibit 51, Transfer and Assumption Agrmt. 266  
20      Exhibit 52, a letter dated September 22, 268  
21      2008, from DTC  
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23      BCI-EX-(S)-00007181  
24      Exhibit 54, a document bearing Bates Nos. 273  
25      BCI-EX-(S)-00007197 through 7201  
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